

Submittal letter from Governor's designee to EPA

Letter from Butch Tongate, Cabinet Secretary, New Mexico
Environment Department, to Ron Curry, Regional
Administrator, EPA Region 6, proposing revision to
State Implementation Plan

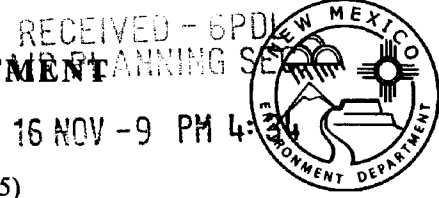


SUSANA MARTINEZ
Governor

JOHN A. SANCHEZ
Lieutenant Governor

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BUTCH TONGATE
Cabinet Secretary

J.C. BORREGO
Acting Deputy Secretary

October 17, 2016

Mr. Ron Curry
Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Subject: Proposed revision to the State Implementation Plan (SIP) addressing requirements of the U.S. Environmental Protection Agency (EPA) SIP Call on excess emissions during periods of startup, shutdown, and malfunction.

Dear Mr. Curry:

I am writing on behalf of Governor Susana Martinez to request approval of the attached documentation, addressing requirements of EPA's May 22, 2015 SIP Call. I am requesting that the regulation on excess emissions in Albuquerque – Bernalillo County, 20.11.49 NMAC, *Excess Emissions*, be withdrawn in its entirety from the New Mexico State Implementation Plan. This proposed SIP revision would apply exclusively to Albuquerque and Bernalillo County, New Mexico.

To support the requested SIP revision, this submittal contains records of a recent rulemaking action by the Albuquerque - Bernalillo County Air Quality Control Board ("Air Board"). Following a duly noticed public hearing on the evening of September 14, 2016, the Air Board authorized a request that same evening to EPA to withdraw 20.11.49 NMAC in its entirety from the SIP. The Air Board also adopted amendments to 20.11.49 NMAC, *Excess Emissions*, removing affirmative defenses from the regulation and replacing them with enforcement discretion provisions. The Air Board authorized this amended regulation as a "state only" measure, to be effective in Albuquerque and Bernalillo County under state law only, outside the EPA-approved SIP.

Thus, this submittal contains records of the public hearing process to amend 20.11.49 NMAC only in support of my request to remove 20.11.49 NMAC from the SIP. I am not requesting that the amended, "state only" regulation itself be incorporated as a SIP revision.

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The September 14, 2016 public hearing was held in accordance with state law and public hearing requirements of 40 CFR § 51.102. The amended regulations were filed with the New Mexico State Records Center on September 15, 2016 and became effective locally on October 15, 2016.

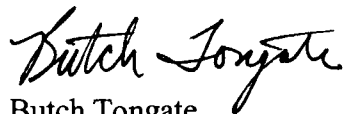
To facilitate your review, one hard copy of this SIP submittal and one exact duplicate in electronic form are enclosed. I believe that the submitted materials provide adequate documentation to support the requested EPA approval.

The supporting submittal materials include the following:

1. SIP Completeness Checklist pursuant to 40 CFR § 51, Appendix V;
2. the final 20.11.49 NMAC adopted by the Air Board as a "state only" regulation;
3. the record of the public hearing on amendment of 20.11.49 NMAC and the request to EPA to withdraw this regulation from the SIP;
4. documentation that this proposed SIP revision meets the requirements of Section 110(l) of the Clean Air Act.

Your favorable consideration of this request is appreciated. If you have any questions, please contact Mary Lou Leonard, Director of the Albuquerque Environmental Health Department (EHD), at (505) 768-2631.

Sincerely,



Butch Tongate
Cabinet Secretary
New Mexico Environment Department

cc: Honorable Susana Martinez, Governor, State of New Mexico
Jennifer Hower, General Counsel, NMED
Michael Vonderheide, Director, Environmental Protection Division, NMED
Richard Goodyear, Chief, Air Quality Bureau, NMED
Jane Cudney-Black, Chair, Albuquerque - Bernalillo County Air Quality Control Board
Danny Nevarez, Deputy Director, Albuquerque EHD
Dario Rocha, Control Strategies Manager, Air Quality Program, Albuquerque EHD

Proposed revision to State Implementation Plan (SIP)
addressing requirements of EPA SIP Call on provisions
for excess emissions during startup, shutdown, malfunction and emergency

November 2016

SIP COMPLETENESS CHECKLIST

For regular processing
(Per 40 CFR 51 Appendix V)

2.1 Administrative Materials

- (a) A formal letter of submittal from the Governor or designee, requesting EPA approval of the plan or revision thereof (hereafter “the plan”).

☒ YES ☐ NO ☐ N/A

The package is being sent to EPA with a formal submittal letter from the designee of the Governor of the State of New Mexico. The designee is the Cabinet Secretary of the New Mexico Environment Department.

- (b) Evidence that the State has adopted the plan in the State code or body of regulations; or issued the permit, order, consent agreement (hereafter “document”) in final form. That evidence shall include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date.

☒ YES ☐ NO ☐ N/A

The Albuquerque - Bernalillo County Air Quality Control Board (Air Board) adopted amendments to 20.11.49 NMAC, Excess Emissions, on September 14, 2016 during their regular meeting, which followed a public hearing held on the same night. The amended 20.11.49 NMAC removes all provisions for affirmative defenses from the regulation. At the same September 14, 2016 hearing, the Air Board authorized a request to EPA to withdraw 20.11.49 NMAC in its entirety from the SIP.

This submittal contains the following items as evidence that requirement 2.1(b) of 40 CFR Part 51, Appendix V has been met.

Attachment A contains the amended regulation as filed with the New Mexico State Records Center and Archives (SRCA) on September 15, 2016. The date of filing with SRCA is indicated by the date stamp at the top of the filed rule. Attachment A also contains the transmittal form required by the SRCA and signed by Air Board Chair Jane Cudney-Black.

Attachment B contains the amended rule as published in the New Mexico Register on September 30, 2016, which is the date the rule became effective.

Attachment B shows the rule in two different formats. Both formats show the same rule.

Attachment C contains the administrative record of the Air Board's rulemaking and hearing process, which includes a copy of the Air Board's Order and Statement of Reasons adopting the amended rule on September 14, 2016. The Order and Statement of Reasons appear as Docket item number 13, as indicated on the Draft Record Proper Index.

- (c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.

 X YES NO N/A

The following legal authorities constitute evidence that Albuquerque – Bernalillo County, through the Air Board and the City of Albuquerque, Environmental Health Department (“EHD”), have the necessary legal authority to meet requirement 2.1(c) of 40 CFR Part 51, Appendix V.

The City of Albuquerque, Environmental Health Department, is the legally designated agency empowered to “develop facts and make investigations and studies consistent with the Air Quality Control Act.” See NMSA 1978 § 74-2-5.1(A).

The state statutes and local ordinances listed below provide the legal authority under which the Air Board adopted the amended 20.11.49 NMAC and authorized a request to EPA to remove 20.11.49 NMAC in its entirety from the SIP. These same statutes and local ordinances provide the legal authority for the amended regulation and SIP to be implemented.

NMSA 1978 § 74-2-4, Local authority;

NMSA 1978 § 74-2-5, Duties and powers, environmental improvement board, local board;

NMSA 1978 § 74-2-5.1, Duties and powers of the department and the local agency;

NMSA 1978 § 74-2-5.2, State air pollution control agency; specific duties and powers of the department.

Revised Ordinances of the City of Albuquerque (“ROA”), Section 9-5-1-4, Duties and powers of the board, and Section 9-5-1-5, Duties and powers of the department;

Bernalillo County Ordinances, Section 30-33, Duties and powers of the board, and Section 30-34, Duties and powers of the department.

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EXTERNAL AFFAIRS DIVISION

Attachment C, the administrative record of the Air Board's rulemaking action, provides hearing exhibits and hearing transcripts, both of which contain further discussion of local legal authority to adopt and implement the amended 20.11.49 NMAC and proposed SIP Revision. See also in Attachment C the Order and Statement of Reasons adopted by the Air Board, which cites the appropriate legal authority..

- (d) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes made (such as *redline/strikethrough*) to the existing approved plan, where applicable. The submittal shall be a copy of the official State regulation/document signed, stamped, dated by the appropriate State official indicating that it is fully enforceable by the State. The effective date of the regulation/document shall, whenever possible, be indicated in the document itself. If the State submits an electronic copy, it must be an exact duplicate of the hard copy with changes indicated, signed documents need to be in portable document format, rules need to be in text format and files need to be submitted in manageable amounts (i.e. a file for each section or chapter, depending upon size, and separate files for each distinct document) unless otherwise agreed to by the State and Regional Office.

☒ YES ☐ NO ☐ N/A

All the materials discussed below are provided in both electronic and hard copy, each of which is an exact duplicate of the other.

Attachments A and B provide copies of the final amended 20.11.49 NMAC adopted by the Air Board, filed with the State Records Center and Archives, and published in the New Mexico Register. The amended regulation indicates its effective date. Amendments in the new rule as compared to the old rule are indicated in the documents provided in Attachments A and B.

Attachment C, containing the administrative record of the Air Board's rulemaking action, provides the Order and Statement of Reasons by the Air Board in support of adopting the amended regulation and authorizing a request to EPA for the withdrawal of 20.11.49 NMAC in its entirety from the SIP.

The hearing records in Attachment C also provide documents indicating changes made in the 20.11.49 NMAC compared to the language of the former version of the regulation.

The amended 20.11.49 NMAC in Attachment A is dated and stamped by the SRCA, the agency responsible under state law for certifying that adopted regulations have been properly filed in order to become legally enforceable. The Transmittal Form included in Attachment A, signed by the Air Board chair, is required under state law to indicate that a regulation has been properly adopted after a public hearing and properly filed with the SRCA.

The Order and Statement of Reasons by the Air Board, included in Attachment C, is signed and dated by the Board chair, properly setting forth as required under state law a sufficient explanation of the basis for the Air Board's actions.

Note that the final amended 20.11.49 NMAC adopted by the Air Board September 14 and subsequently published in the New Mexico Register contains a minor floor amendment recommended by EHD at the September 14 hearing. The Air Board's adoption of this amendment means the final regulation differs very slightly from the initial version of the regulation proposed in EDH's rulemaking petition filed June 27, 2016. The difference makes minor changes to 20.11.49.16.D NMAC to clarify that EHD, when designing a remedy for an excess emission in an enforcement action, retains the authority to consider information about an excess emission reported by a source.

- (e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan.

 X YES NO N/A

The administrative record of the rulemaking process by the Air Board appears in Attachment C. This administrative record demonstrates that adoption of the rule complied with all state legal requirements. A complete guide to materials included in this administrative record as of the date of this SIP submittal appears in Attachment C. as Docket item 0, "Part 49 – Draft Record Proper Index."

Note that the Draft Record Proper Index identifies audio recordings of Air Board meetings on July 13 and September 14 as being included in the administrative record. This SIP submittal does not include the audio recording files. However, the electronic and hard copies of this submittal conform to all requirements of 40 CFR 51.103 and 40 CFR Part 51, Appendix V. The print and hard copies of this submittal are exact duplicates of each other.

Specific items in the materials for this submittal fulfil the following state legal requirements.

Attachments A and B of this submittal contain the text of the amended 20.11.49 NMAC as filed with the State Records Center and Archives and published in the New Mexico Register, thereby fulfilling requirements of NMSA 1978 § 14-4-1 et seq. and 1.24.1, 1.24.10, and 1.24.15 NMAC.

Attachment C contains evidence that a petition for rulemaking was filed and acted upon by the Air Board as required by NMSA 1978 § 74-2-6(A), ROA § 9-5-1-6(A), Bernalillo County Ordinances § 30-35(a), and 20.11.82 NMAC.

Attachment C contains a Notice of Intent to Present Technical Testimony and hearing exhibits, all of which were filed in advance of the hearing as required by 20.11.82 NMAC.

Attachment C, the administrative record of the Air Board's rulemaking action, contains hearing notices published a minimum of 30 days before the September 14, 2016 hearing, as required by NMSA 1978 § 74-2-6(C), ROA § 9-5-1-6(C), Bernalillo County Ordinances § 30-35(c), and 20.11.82 NMAC. All hearing notices appear in Docket item 5, "Affidavit of Publication and Notice of Filing" and Docket item 14, "Notice of Filing." These items provide proof of notice of the public hearing.

Attachment C, which provides the administrative record of the Air Board's rulemaking action, contains hearing transcripts showing that a hearing was held on September 14, 2016 as required by NMSA 1978 § 74-2-6(B), ROA § 9-5-1-6(B), Bernalillo County Ordinances § 30-35(b) and 20.11.82 NMAC.

- (f) Evidence that public notice was given of the proposed change consistent with procedures approved by EPA; including the date of publication of such notice.

☒ YES ☐ NO ☐ N/A

Consistent with EPA regulations, Attachment C contains hearing notices published a minimum of 30 days before the September 14, 2016 hearing, as required by NMSA 1978 § 74-2-6(C), ROA § 9-5-1-6(C), Bernalillo County Ordinances § 30-35(c), and 20.11.82 NMAC. The hearing notices contain the date of publication. Proof of hearing notice appears in Docket item 5, "Affidavit of Publication and Notice of Filing" and Docket item 14, "Notice of filing."

- (g) Certification that a public hearing was held in accordance with the information provided in the public notice and the State's laws and constitution, if applicable and consistent with the public hearing requirements in 40 CFR 51.102.

☒ YES ☐ NO ☐ N/A

Attachment A contains a Transmittal Form filed with the State Records Center and Archives to certify, among other things, that a hearing was held on September 14, 2016.

Attachment C, the administrative record of the Air Board's rulemaking action, contains certified hearing transcripts showing that a hearing was held on September 14, 2016.

- (h) Compilation of public comments and the State's response thereto.

☒ YES ☐ NO ☐ N/A

Attachment C contains hearing exhibits that include public comments received on the rulemaking action for 20.11.49 NMAC and EHD's response to those comments.

The Order and Statement of Reasons by the Air Board, included in Attachment C, is signed and dated by the Board chair, properly setting forth as required under state law a sufficient explanation of the basis for the Air Board's actions.

Note that the final amended 20.11.49 NMAC adopted by the Air Board September 14 and subsequently published in the New Mexico Register contains a minor floor amendment recommended by EHD at the September 14 hearing. The Air Board's adoption of this amendment means the final regulation differs very slightly from the initial version of the regulation proposed in EDH's rulemaking petition filed June 27, 2016. The difference makes minor changes to 20.11.49.16.D NMAC to clarify that EHD, when designing a remedy for an excess emission in an enforcement action, retains the authority to consider information about an excess emission reported by a source.

- (e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan.

 X YES NO N/A

The administrative record of the rulemaking process by the Air Board appears in Attachment C. This administrative record demonstrates that adoption of the rule complied with all state legal requirements. A complete guide to materials included in this administrative record as of the date of this SIP submittal appears in Attachment C. as Docket item 0, "Part 49 – Draft Record Proper Index."

Note that the Draft Record Proper Index identifies audio recordings of Air Board meetings on July 13 and September 14 as being included in the administrative record. This SIP submittal does not include the audio recording files. However, the electronic and hard copies of this submittal conform to all requirements of 40 CFR 51.103 and 40 CFR Part 51, Appendix V. The print and hard copies of this submittal are exact duplicates of each other.

Specific items in the materials for this submittal fulfil the following state legal requirements.

Attachments A and B of this submittal contain the text of the amended 20.11.49 NMAC as filed with the State Records Center and Archives and published in the New Mexico Register, thereby fulfilling requirements of NMSA 1978 § 14-4-1 et seq. and 1.24.1, 1.24.10, and 1.24.15 NMAC.

Attachment C contains evidence that a petition for rulemaking was filed and acted upon by the Air Board as required by NMSA 1978 § 74-2-6(A), ROA § 9-5-1-6(A), Bernalillo County Ordinances § 30-35(a), and 20.11.82 NMAC.

Attachment C contains a Notice of Intent to Present Technical Testimony and hearing exhibits, all of which were filed in advance of the hearing as required by 20.11.82 NMAC.

2.2 Technical Support

- (a) Identification of all regulated pollutants affected by the plan.

☒ YES ☐ NO ☐ N/A

20.11.49 NMAC applies to all regulated pollutants.

- (b) Identification of the locations of affected sources including the EPA attainment/nonattainment designation of the locations and the status of the attainment plan for the affected area(s).

☐ YES ☐ NO ☒ N/A

20.11.49 NMAC applies to all regulated pollutant sources in Albuquerque and Bernalillo County at all times, regardless of whether a source is in an area designated as in attainment or nonattainment.

- (c) Quantification of the changes in plan-allowable emissions from the affected sources; estimates of changes in current actual emissions from affected sources or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.

☐ YES ☐ NO ☒ N/A

The amendments to 20.11.49 NMAC and its withdrawal from the SIP are not intended to directly affect emissions from any regulated source. Attachment C contains a hearing exhibit demonstrating that amendment of 20.11.49 NMAC and its withdrawal from the SIP will be consistent with Section 110(l) of the Clean Air Act. This document appears in Attachment C as part of Docket item number 6, which is EHD's Notice of Intent to Present Technical Testimony, docketed on August 29, 2016. Within that document, please see Exhibit 12, which is entitled, "Analysis Demonstrating Compliance with Requirements of the Clean Air Act, Section 110(l)."

- (d) The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented. For all requests to redesignate an area to attainment for a national primary ambient air quality standard, under Section 107 of the Act, a revision must be submitted to provide for the maintenance of the national primary ambient air quality standards for at least 10 years as required by Section 175A of the Act.

☒ YES ☐ NO ☐ N/A

Attachment C contains a hearing exhibit demonstrating that amendment of 20.11.49 NMAC and its withdrawal from the SIP will be consistent with Section 110(l) of the Clean Air Act. This document appears in Attachment C as part of

Docket item number 6, which is EHD's Notice of Intent to Present Technical Testimony, docketed on August 29, 2016. Within that document, please see Exhibit 12, which is entitled, "Analysis Demonstrating Compliance with Requirements of the Clean Air Act, Section 110(l)."

- (e) Modeling information required to support the proposed revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other information relevant to the determination of adequacy of the modeling analysis.

☐ YES ☐ NO ☒ N/A

- (f) Evidence, where necessary, that emission limitations are based on continuous emission reduction technology.

☐ YES ☐ NO ☒ N/A

- (g) Evidence that the plan contains emission limitations, work practice standards and record keeping/reporting requirements, where necessary, to ensure emission levels.

☐ YES ☐ NO ☒ N/A

- (h) Compliance/enforcement strategies, including how compliance will be determined in practice.

☒ YES ☐ NO ☐ N/A

The text of the amended regulation describes in detail how EHD will pursue enforcement actions involving excess emissions related to startup, shutdown, malfunction, and emergency. Hearing testimony and exhibits included in Attachment C also describe the compliance and enforcement strategies that EHD will pursue.

- (i) Special economic and technical justification required by any applicable EPA policies, or an explanation of why such justifications are not necessary.

☐ YES ☐ NO ☒ N/A

Attachment A

Attachment A contains copies of the following.

- 1) Amended 20.11.49 NMAC, as filed with State Records Center and Archives following adopting by Albuquerque Bernalillo Air Quality Control Board
- 2) Transmittal Form submitted to State Records Center and Archive upon filing of amended 20.11.49 NMAC

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This is an amendment to 20.11.100 NMAC, Sections 6, 13, 14, 15, 16, 17, and 18, effective 10/15/2016.

20.11.49.6 OBJECTIVE: To implement requirements for the reporting of excess emissions ~~(and establish affirmative defense provisions for facility owners and operators for excess emissions.)~~ for facility owners and operators.

[20.11.49.6 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.13 APPLICABILITY:

A. Any source:

(1) whose operation results in an emission of a regulated air pollutant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition; or

(2) subject to the requirements of 20.11.47 NMAC, *Emissions Inventory Requirements*, 20.11.41 NMAC [~~Authority To Construct~~], *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

B. Deviations under 20.11.42 NMAC, *Operating Permits*, which do not result in excess emissions, are not subject to the provisions of 20.11.49 NMAC.

C. 20.11.49 NMAC does not create a separate cause of action for failure to obtain a permit under 20.11.41 NMAC [~~Authority To Construct~~], *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

[20.11.49.13 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.14 OPERATION RESULTING IN AN EXCESS EMISSION: The emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action. ~~[The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.]~~ If the owner or operator of a source having an excess emission chooses to continue to operate it while the excess emission continues, the owner or operator shall take all appropriate measures consistent with good air pollution control practices for minimizing emissions. The duration and extent of any excess emission and the owner or operator's efforts to minimize the excess emission may be considered by the department in any resulting enforcement action.

[20.11.49.14 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.15 NOTIFICATION:

A. The owner or operator of a source having an excess emission shall report the following information to the department on forms provided by the department. The department may authorize the submittal of such reports in electronic format. ~~[The department may require that the owner or operator of a source provide supplemental information in addition to that already required by 20.11.49.15 NMAC. The additional information shall be reported by the by a deadline specified by the department.]~~ The department may require that the owner or operator of a source provide further information in addition to that already required by 20.11.49.15 NMAC by a deadline specified by the department.

(1) **Initial excess emission report:** The owner or operator shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission. The initial report shall include all available information regarding each item required by Subsection B of 20.11.49.15 NMAC.

(2) **Final excess emission report:** No later than 10 days after the end of the excess emission, the owner or operator shall file a final report that contains specific and detailed information for each item required by Subsection B of 20.11.49.15 NMAC.

B. ~~[The]~~ Each excess emission report shall include the following information:

- (1) the name of the source;
- (2) the name of the owner and operator of the source;
- (3) the name and title of the person preparing the report;
- (4) identifying information for the source (e.g. permit and database numbers);
- (5) the specific date(s), ~~[and time(s) the excess emission occurred;]~~ time(s), and duration of the excess emission;

- (6) identification of the equipment involved and the emission point(s) (including bypass) from which the excess emission occurred;
- (7) the air quality regulation or permit condition that was exceeded;
- (8) identification of the air contaminant(s) and the magnitude of the excess emission expressed in the units of the air quality regulation or permit condition;
- (9) the method for determining the magnitude and duration of the excess emission;
- (10) the cause and nature of the excess emission;
- (11) the steps taken to limit the duration and magnitude of the excess emission;
- (12) the corrective action(s) taken to eliminate the cause of the excess emission; if one or more corrective actions are required, the report shall include a schedule for implementation of those actions, with associated progress reports; if no corrective actions are required, the report shall include a detailed explanation for that conclusion.
- (13) the corrective action(s) taken to prevent a recurrence of the excess emission;
- (14) whether the owner or operator attributes the excess emission to malfunction, startup [or shutdown] , shutdown or emergency;
- (15) whether the owner or operator [~~will claim an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC; if claiming an affirmative defense, an analysis and the supporting evidence for each reason shall be submitted no later than 30 days after submittal of the final report required by 20.11.49.15 NMAC; no later than 30 days after the earlier of the department's receipt of the final report or the deadline for submitting the final report, if the department receives a request for an extension from the owner or operator of the source, the department may grant an extension to complete the analysis not to exceed 30 additional days; and~~] intends to file a supplemental report under Subsections A, B, or C of 20.11.49.16 NMAC; and
- (16) [~~the contents of the final report shall contain a signed certification of truth, accuracy, and completeness; the certification shall be signed by the person who is reporting the excess emission.~~] the person signing the final report shall certify that it is true, accurate, and complete.

C. If the period of an excess emission extends beyond 10 days, the owner or operator shall submit the final report required by Subsection B of 20.11.49.15 NMAC to the department within 72 hours of the date and time the excess emission ceased.

D. **Alternative reporting.** If an owner or operator of a source is subject to both the excess emission reporting requirements of 20.11.49.15 NMAC and the reporting requirements of 40 CFR Parts 60, 61, and 63, and the federal reporting requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice.

[20.11.49.15 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.16 [AFFIRMATIVE DEFENSES:] EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, MALFUNCTION, OR EMERGENCY: ~~All periods of excess emissions regardless of cause are violations [of the act and the rules promulgated thereunder, the New Mexico Air Quality Control Act and rules promulgated thereunder, and applicable permit or other authorization of the air board. 20.11.49 NMAC provides an affirmative defense to owners and operators for civil or administrative penalty actions brought for excess emissions during periods of startup, shutdown malfunction or emergency, unless otherwise prohibited by Subsection D of 20.11.49.16 NMAC. 20.11.49.15 NMAC shall not be construed as limiting EPA's or citizens' authority under the act. The department may require the owner or operator of a source to provide supplemental information in addition to that already required by 20.11.49.16 NMAC. The additional information shall be reported by the deadline specified by the department.] of the state Air Quality Control Act and rules promulgated thereunder, and any applicable permit. The owner or operator of a source who contends that an excess emission occurred during startup, shutdown, malfunction, or emergency may submit to the department a supplemental report addressing the criteria described in Subsections A, B, or C of 20.11.49.16 NMAC. To be considered by the department, the appropriate supplemental report described in Subsections A, B, or C of 20.11.49.16 NMAC below must be submitted to the department no later than 30 days after the final excess emissions report submitted pursuant to 20.11.49.15 NMAC. The department may grant written extensions to this deadline for good cause shown. An owner or operator of a source who contends that enforcement action for an excess emission is not warranted must provide information in a supplemental report as described in Subsections A, B, or C of 20.11.49.16 NMAC. If no supplemental report is timely received, the department will not consider the criteria described in Subsections A, B, and C of 20.11.49.16 NMAC. The department may require the owner or operator of a source to provide further information in addition to that already contained in the supplemental report or otherwise specified in 20.11.49.16 NMAC. The information in the supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable~~

in a legal proceeding by any party or to limit the enforcement authority of any party. 20.11.49.16 NMAC shall not be construed to preclude EPA or federal court jurisdiction under Section 113 of the federal act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under Section 113 of the federal act, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of Section 304 of the federal act.

A. **[Affirmative defense] Supplemental report for an excess emission during malfunction:** ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during malfunction, against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during malfunction, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during malfunction, shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during malfunction addressing the following criteria:

- (1) the excess emission was caused by a malfunction;
- (2) the excess emission:
 - (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for; and
 - (b) could not have been avoided by better operation and maintenance practices;
- (3) to the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;
- (4) repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded; off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;
- (5) the amount and duration of the excess emission (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
- (6) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;
- (7) all emission monitoring systems were kept in operation if at all possible;
- (8) the owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence;
- (9) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
- (10) the owner or operator complied with ~~the~~ all notification requirements in 20.11.49.15 NMAC.

B. **[Affirmative defense] Supplemental report for an excess emission during startup or shutdown:** ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during startup or shutdown against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during startup or shutdown, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during startup or shutdown shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during startup or shutdown, addressing the following criteria:

- (1) the excess emission occurred during a startup or shutdown;
- (2) the periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design;
- (3) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (4) if the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- (5) at all times, the source was operated in a manner consistent with good practices for minimizing emissions;
- (6) the frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;

(7) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(8) all emissions monitoring systems were kept in operation if at all possible;

(9) the owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and

(10) the owner or operator complied with [the] all notification requirements in 20.11.49.15 NMAC.

C. [Affirmative defense for an emergency.]

~~(1) An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission limitation if the owner or operator of the source demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~(a) an emergency occurred and that the owner or operator can identify the cause(s) of the emergency;~~

~~(b) the source was being properly operated at the time;~~

~~(c) during the period of the emergency the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the technology-based emission limitation; and~~

~~(d) the owner or operator fulfilled the notification requirements under Subsection A of 20.11.49.15 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~(2) In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.~~

D. Affirmative defenses prohibited. The affirmative defense provisions of this section shall not be available for:

~~(1) claims for injunctive relief;~~

~~(2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception;~~

~~(3) excess emissions that cause an exceedance of the NAAQS or PSD increments;~~

~~(4) failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63; or~~

~~(5) violations of requirements that derive from 40 CFR Parts 60, 61 and 63 or any other federally enforceable performance standard or emission limit.~~

E. Department's determination of adequacy of affirmative defense. The department may issue a determination regarding an owner or operator's assertion of the affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to 20.11.49 NMAC or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to 20.11.49.18 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Paragraph (15) of Subsection B of 20.11.49.15 NMAC.]

Supplemental report for an emergency: The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during an emergency addressing the following criteria:

- (1) an emergency occurred;
- (2) the excess emission occurred during the emergency;
- (3) the owner or operator has identified the cause of the emergency;
- (4) the excess emission resulted from the emergency;
- (5) the excess emission and resulting emergency could not have been prevented through careful planning and design;
- (6) the excess emission and resulting emergency were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (7) at the time the excess emission and emergency occurred, the source was being properly operated;
- (8) during the period of the excess emission, the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the applicable standard, regulation, or permit condition; and

(9) the owner or operator complied with all notification requirements in 20.11.49.15 NMAC, including a description of the emergency, any steps to mitigate emissions, and corrective actions taken.

D. Department's determination of adequacy of supplemental report: Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for any excess emission including, but not limited to, any exceedance of a limit which already takes into account startup and shutdown emissions, any NAAQS or PSD increment, or any federally promulgated limit or any requirement derived from such a limit, including 40 CFR Parts 60, 61, and 63. However, the department in its sole discretion may consider any relevant information, including information submitted in a supplemental report, in connection with a demand for corrective action or injunctive relief, or the assessment or negotiation of a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion.
[20.11.49.16 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.17 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS:

A. Upon receipt of a written demand by the department, the owner or operator of a source having an excess emission, shall prepare an analysis that uses analytical tools determined by the department to be appropriate. The analysis shall contain the following information:

- (1) an analysis describing the root cause and all contributing causes of the excess emission;
and
- (2) an analysis of the corrective actions implemented or available to reduce the likelihood of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.11.49.17 NMAC, including, as applicable:
 - (a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;
 - (b) the estimated cost associated with each corrective action alternative;
 - (c) the probable effectiveness of each corrective action alternative;
 - (d) if no corrective action alternatives are available, a clear explanation providing an adequate justification for that conclusion; and
 - (e) if one or more corrective actions are identified, a schedule for implementation and progress reports.

B. The department shall make the demand for ~~an~~ a root cause and corrective action analysis no later than 90 days after receipt of the final report required by Subsection A of 20.11.49.15 NMAC.

C. The department may require the analysis authorized by Subsection A of 20.11.49.17 NMAC after considering relevant factors. Examples of relevant factors include the significance of the excess emission, the nature or pattern of excess emissions, and the history of the source, as well as any other factors determined to be relevant by the department.

D. The completed analysis shall be submitted to the department no later than 60 days after the department's demand is received by the owner or operator of the source, pursuant to Subsection A of 20.11.49.17 NMAC. For good cause shown, the department may grant an extension to submit the analysis.

E. The owner or operator of a source complying with 20.11.49.17 NMAC may assert a claim for confidential information protection.

[20.11.49.17 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.18 ~~[FUTURE ENFORCEMENT ACTION: The department may commence an administrative or judicial enforcement action against the owner or operator of a source for an excess emission for which the department has made a determination pursuant to Subsection E of 20.11.49.16 NMAC if the department determines that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal operation, or other appropriate reason.]~~ **[RESERVED]**
[20.11.49.18 NMAC - N, 10/13/09; Repealed, 10/15/16]

NMAC TRANSMITTAL FORM

HISTORICAL

ALD Use Only Volume: XXVII Issue: 18 Publication Date: 09 / 30 / 2016 [Sequence # _____]								
1. Issuing Agency Albuquerque-Bernalillo County Air Quality Control Board		2. Agency DFA Code 667						
3. Agency Address PO Box 1293, Albuquerque NM 87103								
4. Contact Person Name: Ed Merta Phone #: (505) 768-2660 E-mail: emerta@cabq.gov								
5. Type of Rule Action <input type="checkbox"/> New <input checked="" type="checkbox"/> Amendment <input type="checkbox"/> Repeal <input type="checkbox"/> Repeal/Replace <input type="checkbox"/> Renumber <input type="checkbox"/> Emergency								
6. Total number of pages: 5	7. Hearing date: 9/14/2016	8. Effective date: 10/15/2016						
9. NMAC Number <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">Title</td> <td style="width: 33%;">Chapter</td> <td style="width: 33%;">Part</td> </tr> <tr> <td>20</td> <td>11</td> <td>49</td> </tr> </table>			Title	Chapter	Part	20	11	49
Title	Chapter	Part						
20	11	49						
10. NMAC Name <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">Title</td> <td style="width: 33%;">Chapter</td> <td style="width: 33%;">Part</td> </tr> <tr> <td>Environmental Protection</td> <td>Albuquerque - Bernalillo County Air Quality Control Board</td> <td>Excess Emissions</td> </tr> </table>			Title	Chapter	Part	Environmental Protection	Albuquerque - Bernalillo County Air Quality Control Board	Excess Emissions
Title	Chapter	Part						
Environmental Protection	Albuquerque - Bernalillo County Air Quality Control Board	Excess Emissions						
11. Amendment Description (Amendment filing only) Amended seven sections		12. Amendment's NMAC Citation (If applicable) 20.11.49.6, 13, 14, 15, 16, 17 & 18 NMAC						
13. Most recent filing date (ALD Use Only) 09 / 11 / 2009								
14. Are there any materials incorporated by reference? <table style="width: 100%;"> <tr> <td style="width: 30%;"> No <input checked="" type="checkbox"/> Yes <input type="checkbox"/> </td> <td style="width: 30%;"> <i>Please list attachments and Internet site(s) if applicable</i> </td> <td style="width: 40%;"> Reference / Internet site 1. _____ 2. _____ 3. _____ </td> </tr> </table>			No <input checked="" type="checkbox"/> Yes <input type="checkbox"/>	<i>Please list attachments and Internet site(s) if applicable</i>	Reference / Internet site 1. _____ 2. _____ 3. _____			
No <input checked="" type="checkbox"/> Yes <input type="checkbox"/>	<i>Please list attachments and Internet site(s) if applicable</i>	Reference / Internet site 1. _____ 2. _____ 3. _____						
15. If materials are attached, has copyright permission been received? <table style="width: 100%;"> <tr> <td style="width: 33%;">No <input type="checkbox"/></td> <td style="width: 33%;">Yes <input type="checkbox"/></td> <td style="width: 33%;">Public domain <input type="checkbox"/></td> </tr> </table>			No <input type="checkbox"/>	Yes <input type="checkbox"/>	Public domain <input type="checkbox"/>			
No <input type="checkbox"/>	Yes <input type="checkbox"/>	Public domain <input type="checkbox"/>						
16. Legal citation(s) that allows the Issuing Agency to regulate and the Issuing Authority to promulgate regulations on this subject (provide all that apply). New Mexico Air Quality Control Act, NMSA 1978 Section 74-2-5; Joint Air Quality Control Board Ordinance, Bernalillo County Ordinances, Section 30-33; Revised Ordinances of the City of Albuquerque, Section 9-5-1-4.								
17. Signature & Title of Issuing Authority (Delegation authority letter MUST be on file with ALD) <table style="width: 100%;"> <tr> <td style="width: 60%;"> Name: Jane Cudney-Black Title: Board Chair Signature [Black Ink Only] </td> <td style="width: 40%; text-align: right;"> Check if delegated authority <input checked="" type="checkbox"/> 14 Sept '16 Date Signed </td> </tr> </table>			Name: Jane Cudney-Black Title: Board Chair Signature [Black Ink Only]	Check if delegated authority <input checked="" type="checkbox"/> 14 Sept '16 Date Signed				
Name: Jane Cudney-Black Title: Board Chair Signature [Black Ink Only]	Check if delegated authority <input checked="" type="checkbox"/> 14 Sept '16 Date Signed							

1.24.10 NMAC

Attachment B

Attachment B contains copies of the following:

- 1) Amended 20.11.49 NMAC as published in online edition of New Mexico Register
- 2) Amended 20.11.49 NMAC as published in print edition of New Mexico Register

This is an amendment to 20.11.100 NMAC, Sections 6, 13, 14, 15, 16, 17, and 18, effective 10/15/2016.

20.11.49.6 OBJECTIVE: To implement requirements for the reporting of excess emissions ~~[and establish affirmative defense provisions for facility owners and operators for excess emissions.]~~ for facility owners and operators.

[20.11.49.6 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.13 APPLICABILITY:

A. Any source:

(1) whose operation results in an emission of a regulated air pollutant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition; or

(2) subject to the requirements of 20.11.47 NMAC, *Emissions Inventory Requirements*, 20.11.41 NMAC ~~[, *Authority To Construct*]~~, *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

B. Deviations under 20.11.42 NMAC, *Operating Permits*, which do not result in excess emissions, are not subject to the provisions of 20.11.49 NMAC.

C. 20.11.49 NMAC does not create a separate cause of action for failure to obtain a permit under 20.11.41 NMAC ~~[, *Authority To Construct*]~~, *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

[20.11.49.13 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.14 OPERATION RESULTING IN AN EXCESS EMISSION: The emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action. ~~[The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.]~~ If the owner or operator of a source having an excess emission chooses to continue to operate it while the excess emission continues, the owner or operator shall take all appropriate measures consistent with good air pollution control practices for minimizing emissions. The duration and extent of any excess emission and the owner or operator's efforts to minimize the excess emission may be considered by the department in any resulting enforcement action.

[20.11.49.14 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.15 NOTIFICATION:

A. The owner or operator of a source having an excess emission shall report the following information to the department on forms provided by the department. The department may authorize the submittal of such reports in electronic format. ~~[The department may require that the owner or operator of a source provide supplemental information in addition to that already required by 20.11.49.15 NMAC. The additional information shall be reported by the by a deadline specified by the department.]~~ The department may require that the owner or operator of a source provide further information in addition to that already required by 20.11.49.15 NMAC by a deadline specified by the department.

(1) **Initial excess emission report:** The owner or operator shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission. The initial report shall include all available information regarding each item required by Subsection B of 20.11.49.15 NMAC.

(2) **Final excess emission report:** No later than 10 days after the end of the excess emission, the owner or operator shall file a final report that contains specific and detailed information for each item required by Subsection B of 20.11.49.15 NMAC.

B. ~~[The]~~ Each excess emission report shall include the following information:

- (1) the name of the source;
- (2) the name of the owner and operator of the source;
- (3) the name and title of the person preparing the report;
- (4) identifying information for the source (e.g. permit and database numbers);
- (5) the specific date(s), ~~[and time(s) the excess emission occurred;]~~ time(s), and duration of the excess emission;

- (6) identification of the equipment involved and the emission point(s) (including bypass) from which the excess emission occurred;
 - (7) the air quality regulation or permit condition that was exceeded;
 - (8) identification of the air contaminant(s) and the magnitude of the excess emission expressed in the units of the air quality regulation or permit condition;
 - (9) the method for determining the magnitude and duration of the excess emission;
 - (10) the cause and nature of the excess emission;
 - (11) the steps taken to limit the duration and magnitude of the excess emission;
 - (12) the corrective action(s) taken to eliminate the cause of the excess emission; if one or more corrective actions are required, the report shall include a schedule for implementation of those actions, with associated progress reports; if no corrective actions are required, the report shall include a detailed explanation for that conclusion.
 - (13) the corrective action(s) taken to prevent a recurrence of the excess emission;
 - (14) whether the owner or operator attributes the excess emission to malfunction, startup [~~or shutdown~~], shutdown or emergency;
 - (15) whether the owner or operator [~~will claim an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC; if claiming an affirmative defense, an analysis and the supporting evidence for each reason shall be submitted no later than 30 days after submittal of the final report required by 20.11.49.15 NMAC; no later than 30 days after the earlier of the department's receipt of the final report or the deadline for submitting the final report, if the department receives a request for an extension from the owner or operator of the source, the department may grant an extension to complete the analysis not to exceed 30 additional days; and~~] intends to file a supplemental report under Subsections A, B, or C of 20.11.49.16 NMAC; and
 - (16) [~~the contents of the final report shall contain a signed certification of truth, accuracy, and completeness; the certification shall be signed by the person who is reporting the excess emission.~~] the person signing the final report shall certify that it is true, accurate, and complete.
- C. If the period of an excess emission extends beyond 10 days, the owner or operator shall submit the final report required by Subsection B of 20.11.49.15 NMAC to the department within 72 hours of the date and time the excess emission ceased.
- D. **Alternative reporting.** If an owner or operator of a source is subject to both the excess emission reporting requirements of 20.11.49.15 NMAC and the reporting requirements of 40 CFR Parts 60, 61, and 63, and the federal reporting requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice.
- [20.11.49.15 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.16 [AFFIRMATIVE DEFENSES:] EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, MALFUNCTION, OR EMERGENCY: All periods of excess emissions regardless of cause are violations [of the act and the rules promulgated thereunder, the New Mexico Air Quality Control Act and rules promulgated thereunder, and applicable permit or other authorization of the air board. 20.11.49 NMAC provides an affirmative defense to owners and operators for civil or administrative penalty actions brought for excess emissions during periods of startup, shutdown malfunction or emergency, unless otherwise prohibited by Subsection D of 20.11.49.16 NMAC. 20.11.49.15 NMAC shall not be construed as limiting EPA's or citizens' authority under the act. The department may require the owner or operator of a source to provide supplemental information in addition to that already required by 20.11.49.16 NMAC. The additional information shall be reported by the deadline specified by the department.] of the state Air Quality Control Act and rules promulgated thereunder, and any applicable permit. The owner or operator of a source who contends that an excess emission occurred during startup, shutdown, malfunction, or emergency may submit to the department a supplemental report addressing the criteria described in Subsections A, B, or C of 20.11.49.16 NMAC. To be considered by the department, the appropriate supplemental report described in Subsections A, B, or C of 20.11.49.16 NMAC below must be submitted to the department no later than 30 days after the final excess emissions report submitted pursuant to 20.11.49.15 NMAC. The department may grant written extensions to this deadline for good cause shown. An owner or operator of a source who contends that enforcement action for an excess emission is not warranted must provide information in a supplemental report as described in Subsections A, B, or C of 20.11.49.16 NMAC. If no supplemental report is timely received, the department will not consider the criteria described in Subsections A, B, and C of 20.11.49.16 NMAC. The department may require the owner or operator of a source to provide further information in addition to that already contained in the supplemental report or otherwise specified in 20.11.49.16 NMAC. The information in the supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable

in a legal proceeding by any party or to limit the enforcement authority of any party. 20.11.49.16 NMAC shall not be construed to preclude EPA or federal court jurisdiction under Section 113 of the federal act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under Section 113 of the federal act, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of Section 304 of the federal act.

A. **[Affirmative defense] Supplemental report for an excess emission during malfunction:** ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during malfunction, against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during malfunction, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during malfunction, shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during malfunction addressing the following criteria:

- (1) the excess emission was caused by a malfunction;
- (2) the excess emission:
 - (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for; and
 - (b) could not have been avoided by better operation and maintenance practices;
- (3) to the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;
- (4) repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded; off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;
- (5) the amount and duration of the excess emission (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;
- (6) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;
- (7) all emission monitoring systems were kept in operation if at all possible;
- (8) the owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence;
- (9) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and
- (10) the owner or operator complied with ~~the~~ all notification requirements in 20.11.49.15 NMAC.

B. **[Affirmative defense] Supplemental report for an excess emission during startup or shutdown:** ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during startup or shutdown against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during startup or shutdown, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during startup or shutdown shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during startup or shutdown, addressing the following criteria:

- (1) the excess emission occurred during a startup or shutdown;
- (2) the periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design;
- (3) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (4) if the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- (5) at all times, the source was operated in a manner consistent with good practices for minimizing emissions;
- (6) the frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;

- air quality;
- (7) all possible steps were taken to minimize the impact of the excess emission on ambient
 - (8) all emissions monitoring systems were kept in operation if at all possible;
 - (9) the owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and
 - (10) the owner or operator complied with [the] all notification requirements in 20.11.49.15 NMAC.

C. [Affirmative defense for an emergency.

(1) ~~An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission limitation if the owner or operator of the source demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~(a) an emergency occurred and that the owner or operator can identify the cause(s) of the emergency;~~

~~(b) the source was being properly operated at the time;~~

~~(c) during the period of the emergency the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the technology-based emission limitation; and~~

~~(d) the owner or operator fulfilled the notification requirements under Subsection A of 20.11.49.15 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~(2) In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.~~

D. Affirmative defenses prohibited. The affirmative defense provisions of this section shall not be available for:

~~(1) claims for injunctive relief;~~

~~(2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception;~~

~~(3) excess emissions that cause an exceedance of the NAAQS or PSD increments;~~

~~(4) failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63; or~~

~~(5) violations of requirements that derive from 40 CFR Parts 60, 61 and 63 or any other federally enforceable performance standard or emission limit.~~

E. Department's determination of adequacy of affirmative defense. The department may issue a determination regarding an owner or operator's assertion of the affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to 20.11.49 NMAC or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to 20.11.49.18 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Paragraph (15) of Subsection B of 20.11.49.15 NMAC.]

Supplemental report for an emergency: The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during an emergency addressing the following criteria:

- (1) an emergency occurred;
- (2) the excess emission occurred during the emergency;
- (3) the owner or operator has identified the cause of the emergency;
- (4) the excess emission resulted from the emergency;
- (5) the excess emission and resulting emergency could not have been prevented through careful planning and design;

(6) the excess emission and resulting emergency were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(7) at the time the excess emission and emergency occurred, the source was being properly operated;

(8) during the period of the excess emission, the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the applicable standard, regulation, or permit condition; and

(9) the owner or operator complied with all notification requirements in 20.11.49.15 NMAC, including a description of the emergency, any steps to mitigate emissions, and corrective actions taken.

D. Department's determination of adequacy of supplemental report: Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for any excess emission including, but not limited to, any exceedance of a limit which already takes into account startup and shutdown emissions, any NAAQS or PSD increment, or any federally promulgated limit or any requirement derived from such a limit, including 40 CFR Parts 60, 61, and 63. However, the department in its sole discretion may consider any relevant information, including information submitted in a supplemental report, in connection with a demand for corrective action or injunctive relief, or the assessment or negotiation of a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion.
[20.11.49.16 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.17 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS:

A. Upon receipt of a written demand by the department, the owner or operator of a source having an excess emission, shall prepare an analysis that uses analytical tools determined by the department to be appropriate. The analysis shall contain the following information:

(1) an analysis describing the root cause and all contributing causes of the excess emission;
and

(2) an analysis of the corrective actions implemented or available to reduce the likelihood of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.11.49.17 NMAC, including, as applicable:

(a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;

(b) the estimated cost associated with each corrective action alternative;

(c) the probable effectiveness of each corrective action alternative;

(d) if no corrective action alternatives are available, a clear explanation providing an adequate justification for that conclusion; and

(e) if one or more corrective actions are identified, a schedule for implementation and progress reports.

B. The department shall make the demand for ~~an~~ a root cause and corrective action analysis no later than 90 days after receipt of the final report required by Subsection A of 20.11.49.15 NMAC.

C. The department may require the analysis authorized by Subsection A of 20.11.49.17 NMAC after considering relevant factors. Examples of relevant factors include the significance of the excess emission, the nature or pattern of excess emissions, and the history of the source, as well as any other factors determined to be relevant by the department.

D. The completed analysis shall be submitted to the department no later than 60 days after the department's demand is received by the owner or operator of the source, pursuant to Subsection A of 20.11.49.17 NMAC. For good cause shown, the department may grant an extension to submit the analysis.

E. The owner or operator of a source complying with 20.11.49.17 NMAC may assert a claim for confidential information protection.

[20.11.49.17 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.18 [FUTURE ENFORCEMENT ACTION: ~~The department may commence an administrative or judicial enforcement action against the owner or operator of a source for an excess emission for which the department has made a determination pursuant to Subsection E of 20.11.49.16 NMAC if the department determines that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal operation, or other appropriate reason.] [RESERVED]~~

[20.11.49.18 NMAC - N, 10/13/09; Repealed, 10/15/16]

Adopted Rules

Effective Date and Validity of Rule Filings

Rules published in this issue of the New Mexico Register are effective on the publication date of this issue unless otherwise specified. No rule shall be valid or enforceable until it is filed with the records center and published in the New Mexico Register as provided in the State Rules Act. Unless a later date is otherwise provided by law, the effective date of the rule shall be the date of publication in the New Mexico Register. Section 14-4-5 NMSA 1978.

ALBUQUERQUE- BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

This is an amendment to 20.11.100 NMAC, Sections 6, 13, 14, 15, 16, 17, and 18, effective 10/15/2016.

20.11.49.6 OBJECTIVE:

To implement requirements for the reporting of excess emissions ~~[and establish affirmative defense provisions for facility owners and operators for excess emissions.]~~ for facility owners and operators. [20.11.49.6 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.13 APPLICABILITY:

A. Any source:

(1) whose operation results in an emission of a regulated air pollutant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition; or

(2) subject to the requirements of 20.11.47 NMAC, *Emissions Inventory Requirements*, 20.11.41 NMAC [~~Authority-To-Construct~~], *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

B. Deviations under 20.11.42 NMAC, *Operating Permits*, which do not result in excess emissions, are not subject to the provisions of 20.11.49 NMAC.

C. 20.11.49 NMAC does not create a separate cause of action for failure to obtain a permit under 20.11.41 NMAC [~~Authority-To-Construct~~], *Construction Permits*, 20.11.42 NMAC, *Operating Permits*,

20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

[20.11.49.13 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.14 OPERATION RESULTING IN AN EXCESS EMISSION:

The emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action.

~~[The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.]~~ If the owner or operator of a source having an excess emission chooses to continue to operate it while the excess emission continues, the owner or operator shall take all appropriate measures consistent with good air pollution control practices for minimizing emissions. The duration and extent of any excess emission and the owner or operator's efforts to minimize the excess emission may be considered by the department in any resulting enforcement action. [20.11.49.14 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.15 NOTIFICATION:

A. The owner or operator of a source having an excess emission shall report the following information to the department on forms provided by the department. The department may authorize the submittal of such reports in electronic

format. ~~[The department may require that the owner or operator of a source provide supplemental information in addition to that already required by 20.11.49.15 NMAC. The additional information shall be reported by the by a deadline specified by the department.]~~ The department may require that the owner or operator of a source provide further information in addition to that already required by 20.11.49.15 NMAC by a deadline specified by the department.

(1) Initial

excess emission report: The owner or operator shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission. The initial report shall include all available information regarding each item required by Subsection B of 20.11.49.15 NMAC.

(2) Final

excess emission report: No later than 10 days after the end of the excess emission, the owner or operator shall file a final report that contains specific and detailed information for each item required by Subsection B of 20.11.49.15 NMAC.

B. [The] Each excess emission report shall include the following information:

- (1) the name of the source;
- (2) the name of the owner and operator of the source;
- (3) the name and title of the person preparing the report;
- (4) identifying information for the source (e.g. permit and database numbers);
- (5) the specific date(s), ~~[and time(s) the excess emission occurred;]~~ time(s), and duration of the excess emission;
- (6)

identification of the equipment involved and the emission point(s) (including bypass) from which the excess emission occurred;

(7) the air quality regulation or permit condition that was exceeded;

(8) identification of the air contaminant(s) and the magnitude of the excess emission expressed in the units of the air quality regulation or permit condition;

(9) the method for determining the magnitude and duration of the excess emission;

(10) the cause and nature of the excess emission;

(11) the steps taken to limit the duration and magnitude of the excess emission;

(12) the corrective action(s) taken to eliminate the cause of the excess emission; if one or more corrective actions are required, the report shall include a schedule for implementation of those actions, with associated progress reports; if no corrective actions are required, the report shall include a detailed explanation for that conclusion.

(13) the corrective action(s) taken to prevent a recurrence of the excess emission;

(14) whether the owner or operator attributes the excess emission to malfunction, startup ~~or shutdown~~, shutdown or emergency;

(15) whether the owner or operator ~~will claim an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC; if claiming an affirmative defense, an analysis and the supporting evidence for each reason shall be submitted no later than 30 days after submittal of the final report required by 20.11.49.15 NMAC; no later than 30 days after the earlier of the department's receipt of the final report or the deadline for submitting the final report, if the department receives a request for an extension from the owner or operator of the source, the department may grant an extension to complete the analysis not to exceed~~

30 additional days; and] intends to file a supplemental report under Subsections A, B, or C of 20.11.49.16 NMAC; and

(16) ~~[the contents of the final report shall contain a signed certification of truth, accuracy, and completeness; the certification shall be signed by the person who is reporting the excess emission:] the person signing the final report shall certify that it is true, accurate, and complete.~~

C. If the period of an excess emission extends beyond 10 days, the owner or operator shall submit the final report required by Subsection B of 20.11.49.15 NMAC to the department within 72 hours of the date and time the excess emission ceased.

D. **Alternative reporting.** If an owner or operator of a source is subject to both the excess emission reporting requirements of 20.11.49.15 NMAC and the reporting requirements of 40 CFR Parts 60, 61, and 63, and the federal reporting requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice. [20.11.49.15 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.16 ~~[AFFIRMATIVE DEFENSES:] EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, MALFUNCTION, OR EMERGENCY:~~ All periods of excess emissions regardless of cause are violations ~~[of the act and the rules promulgated thereunder, the New Mexico Air Quality Control Act and rules promulgated thereunder, and applicable permit or other authorization of the air board. 20.11.49 NMAC provides an affirmative defense to owners and operators for civil or administrative penalty actions brought for excess emissions during periods of startup, shutdown malfunction or emergency, unless otherwise prohibited by Subsection D of 20.11.49.16 NMAC. 20.11.49.15 NMAC shall not be construed as limiting EPA's or citizens' authority under the act.~~

The department may require the owner or operator of a source to provide supplemental information in addition to that already required by 20.11.49.16 NMAC. The additional information shall be reported by the deadline specified by the department.] of the state Air Quality Control Act and rules promulgated thereunder, and any applicable permit. The owner or operator of a source who contends that an excess emission occurred during startup, shutdown, malfunction, or emergency may submit to the department a supplemental report addressing the criteria described in Subsections A, B, or C of 20.11.49.16 NMAC. To be considered by the department, the appropriate supplemental report described in Subsections A, B, or C of 20.11.49.16 NMAC below must be submitted to the department no later than 30 days after the final excess emissions report submitted pursuant to 20.11.49.15 NMAC. The department may grant written extensions to this deadline for good cause shown. An owner or operator of a source who contends that enforcement action for an excess emission is not warranted must provide information in a supplemental report as described in Subsections A, B, or C of 20.11.49.16 NMAC. If no supplemental report is timely received, the department will not consider the criteria described in Subsections A, B, and C of 20.11.49.16 NMAC. The department may require the owner or operator of a source to provide further information in addition to that already contained in the supplemental report or otherwise specified in 20.11.49.16 NMAC. The information in the supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable in a legal proceeding by any party or to limit the enforcement authority of any party. 20.11.49.16 NMAC shall not be construed to preclude EPA or federal court jurisdiction under Section 113 of the federal act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA

or the courts from considering the statutory factors for the assessment of civil penalties under Section 113 of the federal act, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of Section 304 of the federal act.

A. [Affirmative defense] Supplemental report for an excess emission during malfunction:

[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during malfunction, against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during malfunction, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during malfunction, shall bear the burden of proof including the demonstration of the following criteria:] The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during malfunction addressing the following criteria:

- (1) the excess emission was caused by a malfunction;
- (2) the excess emission:
 - (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for; and
 - (b) could not have been avoided by better operation and maintenance practices;
- (3) to the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;
- (4) repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded; off-shift labor and overtime must

have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(5) the amount and duration of the excess emission (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(6) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(7) all emission monitoring systems were kept in operation if at all possible;

(8) the owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence;

(9) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the owner or operator complied with [the] all notification requirements in 20.11.49.15 NMAC.

B. [Affirmative defense] Supplemental report for an excess emission during startup or shutdown: [The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during startup or shutdown against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during startup or shutdown, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during startup or shutdown shall bear the burden of proof including the demonstration of the following criteria:] The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during startup or shutdown, addressing the following

criteria:

(1) the excess emission occurred during a startup or shutdown;

(2) the periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design;

(3) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) at all times, the source was operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;

(7) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(8) all emissions monitoring systems were kept in operation if at all possible;

(9) the owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and

(10) the owner or operator complied with [the] all notification requirements in 20.11.49.15 NMAC.

C. [Affirmative defense for an emergency:

(1) An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission limitation if the owner or operator of the source demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:

(a) an emergency occurred and that the owner or operator can identify the cause(s) of the emergency;

(b) the source was being properly operated at the time;

(c) during the period of the emergency the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the technology-based emission limitation; and

(d) the owner or operator fulfilled the notification requirements under Subsection A of 20.11.49.15 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(2) In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.

D. Affirmative defenses prohibited. The affirmative defense provisions of this section shall not be available for:

(1) claims for injunctive relief;

(2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception;

(3) excess emissions that cause an exceedance of the NAAQS or PSD increments;

(4) failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63; or

(5) violations of requirements that derive from 40 CFR Parts 60, 61 and 63 or any other federally enforceable performance standard or emission limit.

E. Department's determination of adequacy of affirmative defense. The department

may issue a determination regarding an owner or operator's assertion of the affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to 20.11.49 NMAC or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to 20.11.49.18 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Paragraph (15) of Subsection B of 20.11.49.15 NMAC.]

Supplemental report for an emergency: The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during an emergency addressing the following criteria:

(1) an emergency occurred;

(2) the excess emission occurred during the emergency;

(3) the owner or operator has identified the cause of the emergency;

(4) the excess emission resulted from the emergency;

(5) the excess emission and resulting emergency could not have been prevented through careful planning and design;

(6) the excess emission and resulting emergency were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(7) at the time the excess emission and emergency occurred, the source was being properly operated;

(8) during the period of the excess emission, the

owner or operator took all reasonable steps to minimize levels of emissions that exceeded the applicable standard, regulation, or permit condition; and

(9) the owner or operator complied with all notification requirements in 20.11.49.15 NMAC, including a description of the emergency, any steps to mitigate emissions, and corrective actions taken.

D. Department's determination of adequacy of supplemental report: Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for any excess emission including, but not limited to, any exceedance of a limit which already takes into account startup and shutdown emissions, any NAAQS or PSD increment, or any federally promulgated limit or any requirement derived from such a limit, including 40 CFR Parts 60, 61, and 63. However, the department in its sole discretion may consider any relevant information, including information submitted in a supplemental report, in connection with a demand for corrective action or injunctive relief, or the assessment or negotiation of a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion. [20.11.49.16 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.17 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS:

A. Upon receipt of a written demand by the department, the owner or operator of a source having an excess emission, shall prepare an analysis that uses analytical tools determined by the department to be appropriate. The analysis shall contain the following information:

(1) an analysis describing the root cause and all contributing causes of the excess emission; and

(2) an analysis of the corrective actions implemented or available to reduce the likelihood

of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.11.49.17 NMAC, including, as applicable:

- (a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;
- (b) the estimated cost associated with each corrective action alternative;
- (c) the probable effectiveness of each corrective action alternative;
- (d) if no corrective action alternatives are available, a clear explanation providing an adequate justification for that conclusion; and
- (e) if one or more corrective actions are identified, a schedule for implementation and progress reports.

B. The department shall make the demand for ~~an~~ a root cause and corrective action analysis no later than 90 days after receipt of the final report required by Subsection A of 20.11.49.15 NMAC.

C. The department may require the analysis authorized by Subsection A of 20.11.49.17 NMAC after considering relevant factors. Examples of relevant factors include the significance of the excess emission, the nature or pattern of excess emissions, and the history of the source, as well as any other factors determined to be relevant by the department.

D. The completed analysis shall be submitted to the department no later than 60 days after the department's demand is received by the owner or operator of the source, pursuant to Subsection A of 20.11.49.17 NMAC. For good cause shown, the department may grant an extension to submit the analysis.

E. The owner or operator of a source complying with 20.11.49.17 NMAC may assert a claim for confidential information protection.
[20.11.49.17 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.18 [FUTURE-ENFORCEMENT ACTION-]

~~The department may commence an administrative or judicial enforcement action against the owner or operator of a source for an excess emission for which the department has made a determination pursuant to Subsection E of 20.11.49.16 NMAC if the department determines that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal operation, or other appropriate reason.] [RESERVED]~~
[20.11.49.18 NMAC - N, 10/13/09; Repealed, 10/15/16]

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

On September 12, 2016, the Children, Youth and Families Department, repealed 8.8.3 NMAC, Governing Background Checks and Employment History Verification and replaced it with 8.8.3 NMAC, Governing Background Checks and Employment History Verification, effective October 1, 2016.

On September 12, 2016, the Children, Youth and Families Department, repealed 8.15.2 NMAC, Child Care Assistance Requirements for Client and Child Care Providers and replaced it with 8.15.2 NMAC, Child Care Assistance Requirements for Child Care Assistance Programs for Client and Child Care Providers, effective October 1, 2016.

On September 12, 2016, the Children, Youth and Families Department, repealed 8.16.2 NMAC, Child Care Licensing, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and Other Early Care and Education Programs and replaced it with 8.16.2 NMAC, Child Care Licensing, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and Other Early Care and Education Programs, effective October 1, 2016.

On September 12, 2016, the Children, Youth and Families Department, repealed 8.17.2 NMAC, Non-Licensed Child Care, Requirements Governing Registration of Non-Licensed Family Child Care Homes and replaced it with 8.17.2 NMAC, Non-Licensed Child Care, Requirements Governing Registration of Non-Licensed Family Child Care Homes, effective October 1, 2016.

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

TITLE 8 SOCIAL SERVICES

CHAPTER 8 CHILDREN, YOUTH AND FAMILIES GENERAL PROVISIONS

PART 3 GOVERNING BACKGROUND CHECKS AND EMPLOYMENT HISTORY VERIFICATION

8.8.3.1 ISSUING

AGENCY: Children, Youth and Families Department
[8.8.3.1 NMAC - Rp, 8.8.3.1 NMAC, 10/1/16]

8.8.3.2 SCOPE: This rule has general applicability to operators, volunteers, including student interns, staff and employees, and prospective operators, staff and employees, of child-care facilities, including every facility, CYFD contractor, program receiving CYFD funding or reimbursement, the administrative office of the courts (AOC) supervised visitation and safe exchange program, or other program that has or could have primary custody of children for twenty hours or more per week, juvenile treatment facilities, and direct providers of care for children in including, but not limited to the following settings: Children's behavioral health services and licensed and registered child care, including shelter care.

[8.8.3.2 NMAC - Rp, 8.8.3.2 NMAC, 10/1/16]

8.8.3.3 STATUTORY AUTHORITY: The statutory

ATTACHMENT C

Administrative record of Albuquerque Bernalillo County Air Quality Control Board rulemaking action to amend 20.11.49 NMAC and authorize proposal to EPA to amend State Implementation Plan

Attachment C contains copies of the following:

- 1) Index to the Administrative Record Proper
- 2) Transcripts of the Board hearing held on September 14, 2016
- 3) Pleadings filed with Air Quality Control Board. Note that Docket Item No. 6 consists of a Notice of Intent to Present Technical Testimony at Board hearing, plus 13 exhibits filed with this Notice of Intent.
- 4) Meeting materials related to Air Board rulemaking (minutes and agenda
- 5) Public comment filed with Air Board after EHD's petition to the Board for a hearing. EHD's response to the single comment appears as Docket Item No. 11. Note that additional comments received by EHD prior to the petition, plus EHD's responses, are included as exhibits with EHD's Notice of Intent to Present Technical Testimony, Docket Item No. 6.

PART 49 - AQCB Petition No. 2016-3
INDEX TO THE ADMINISTRATIVE RECORD PROPER

Document/Description	Date	Docket No.
TRANSCRIPT		
VOLUME <u> </u>		
Rulemaking Hearing	9/14/2016	
PLEADINGS		
VOLUME I		
Environmental Health Department's Petition to Amend 20.11.49 NMAC - <i>Excess Emissions</i> and Requests its Removal from the State Implementation Plan	27-Jun-16	1
Notice of Docketing	29-Jul-16	2
Notice of Hearing Officer Assignment	29-Jul-16	3
Prehearing Order	18-Aug-16	4
Affidavit of Publication and Notice of Filing	26-Aug-16	5
Environmental Health Department's Notice of Intent to Present Technical Testimony	29-Aug-16	6
Environmental Health Department's Legal Brief in Support of Petition to Amend 20.11.49 NMAC	13-Sep-16	7
Supplemental Exhibit #1: EHD's Proposed Floor Amendment: Proposed Changes to EHD's Original Draft	15-Sep-16	8
Supplemental Exhibit #2: Text of EHD's Proposed Floor Amendment	15-Sep-16	9
Supplemental Exhibit #3: EHD's Proposed Amended Order and Statement of Reasons for Adopting Amendments to 20.11.49 NMAC, <i>Excess Emissions</i>	15-Sep-16	10
Supplemental Exhibit #4: EHD's Response to PNM's Emailed Comments	15-Sep-16	11
Supplemental Exhibit #5: EHD's Emailed Response to Western Refining's Emailed Comments	15-Sep-16	12
Order and Statement of Reasons for Adopting Amendments to 20.11.49 NMAC, <i>Excess Emissions</i>	15-Sep-16	13
Notice of Filing	17-Oct-16	14
MEETING MATERIALS		
Draft Agenda for the July 13, 2016 Albuquerque - Bernalillo County Air Quality Control Board Meeting	13-Jul-16	
July 13, 2016 Albuquerque - Bernalillo County Air Quality Control Board Meeting Recording	13-Jul-16	
Approved Minutes from the July 13, 2016 Albuquerque - Bernalillo County Air Quality Control Board Meeting	10-Aug-16	
Draft Agenda for the September 14, 2016 Albuquerque - Bernalillo County Air Quality Control Board Meeting	14-Sep-16	
September 14, 2016 Albuquerque - Bernalillo County Air Quality Control Board Meeting Recording	14-Sep-16	
Draft Minutes from the September 14, 2016 Albuquerque - Bernalillo County Air Quality Control Board Meeting	14-Sep-16	
PUBLIC COMMENT		

PART 49 - AQCB Petition No. 2016-3
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Written Statement from Public Service Company of New Mexico (PNM)	30-Aug-16	
CORRESPONDENCE		

STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD
AQCB PETITION NO: 2016-3
IN THE MATTER OF THE PETITION TO
AMEND 20.11.49 NMAC, EXCESS
EMISSIONS and Request its Removal
from the State Implementation Plan
and Adoption of Statement of
Reasons.

TRANSCRIPT OF PROCEEDINGS
REGULAR MONTHLY MEETING

Agenda Item 4

September 14, 2016

5:30 p.m.

Vincent E. Griego Chambers

Albuquerque-Bernalillo County Government Center

One Civic Plaza, NW

Albuquerque, New Mexico

HELD BEFORE: MS. FELICIA ORTH, ESQ.

Hearing Officer/ABC-AQCB Counsel

REPORTED BY: Cynthia C. Chapman, RMR-CRR, NM CCR #219

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JOB NO.: 6084L (CC)

1 A P P E A R A N C E S

2 For the City of Albuquerque, Environmental Health
3 Department:

4 MR. ERIC AMES

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9 Air Quality Control Board Members Present:

10 MS. JANE CUDNEY-BLACK, Chair

11 MS. KELSEY CURRAN, Vice Chair

12 MR. BEN EVERSON, City Member

13 MR. JENS DEICHMANN, County Member

14 MS. MICHELLE MIANO, County Member

15 MR. LENTON MALRY, BCPC Liaison, Non-Voting Member

16 MR. JAMES PECK, COA/EPC Liaison, Non-Voting Member

17 MS. DEBORAH STOVER, County Member

1 CHAIR CUDNEY-BLACK: So next on the agenda
2 is the matter of the Environmental Health
3 Department's petition to amend 20.11.49 NMAC,
4 "Excess Emissions," and request its removal from the
5 State Implementation Plan, ACQB Petition No. 2016-3.

6 Carol Parker -- actually, Eric Ames --
7 City Att- -- representing the City.

8 I will now turn this hearing over to
9 Hearing Officer Orth.

10 HEARING OFFICER ORTH: Thank you, Madam
11 Chair. Good evening. My name is Felicia Orth, the
12 hearing officer appointed to conduct a hearing in
13 AQCB Petition No. 2016-3.

14 This is a petition to amend 20.11.49 of
15 the New Mexico Administrative Code, titled "Excess
16 Emissions."

17 The hearing will be conducted in
18 accordance with 20.11.82. These are the Board's
19 rule-making procedures. All testimony will be taken
20 under oath and is subject to cross-examination.

21 Members, I know you have received already
22 the Environmental Health Department's Notice of
23 Intent to Present Technical Testimony.

24 You should also have received any public
25 comment and a variety of other documents. The

1 public comment was from PNM, the Public Service
2 Company of New Mexico; but no other technical
3 testimony was received.

4 Public comment will be invited. And after
5 the technical case, we'll invite public comment for
6 those interested in offering it.

7 So, Mr. Ames, if you would, please.

8 MR. ERIC AMES: Okay. Thank you,
9 Ms. Orth.

10 Good evening, Madam Chairwoman, members of
11 the Board. My name is Eric Ames. I'm an attorney
12 here representing tonight the Air Quality program of
13 the Environmental Health Division -- Environmental
14 Health Department. Excuse me.

15 I'm substituting tonight for Ms. Carol
16 Parker, who is temporarily -- temporarily out of
17 action. We wish her well, and hope her -- that she
18 returns to action soon.

19 With me tonight to testify is Mr. Dario
20 Rocha, Manager of the Controlled Strategies Section;
21 Mr. Damon Reyes, Manager of the Enforcement and
22 Compliance Section, and, if necessary, Mr. Ed
23 Murdock, Coordinator of Development of Air Quality
24 Regulations for the Department.

25 The purpose of the hearing tonight is to

1 amend Part 49 of the Air Quality -- of the Air
2 Board's regulations. The Department has proposed
3 these amendments in response to EPA's determination
4 that Part 49 does not comply with the federal Clean
5 Air Act.

6 Now, the Department has filed a short
7 brief, explaining the legal background for our
8 action today. And Mr. Rocha and Mr. Reyes will
9 elaborate on -- on that background during their
10 presentation.

11 But before they begin, I would like to
12 provide you with a short overview of the matter at
13 hand.

14 Now, for many years, the EPA did not have
15 a problem with affirmative defenses for violations
16 of Clean Air Act requirements. Now, by affirmative
17 defense, we mean that, in essence, if a source can
18 prove that a violation was caused by a start-up,
19 shutdown, malfunction, or emergency, and that the
20 event was beyond the control of the source, and that
21 the source did everything within its power to
22 correct the situation, then it could not be assessed
23 a civil penalty for that violation, regardless of
24 how large it was or whether people or the
25 environment were harmed.

1 A few years ago, however, the EPA was sued
2 regarding these affirmative defenses. And in 2014,
3 the D.C. court -- or the D.C. Circuit Court of
4 Appeals in Washington held that these affirmative
5 defenses, to the extent that they applied to
6 violations of requirements under the Clean Air Act,
7 violated the Clean Air Act.

8 And when we say "violations of
9 requirements of the Clean Air Act," we're referring
10 to the National Ambient Air Quality Standards, PSD
11 Increments, the National Emissions Standards for
12 Hazardous Air Pollutants, the Maximum Achievable
13 Control Technology Standards, or "MACTS," that you
14 may be familiar with; and then, finally, the New
15 Source Performance Standards, or the NSPS.

16 The D.C. Circuit ordered EPA to eliminate
17 affirmative defenses from State Implementation
18 Plans. And in response, the EPA turned and issued
19 what's called a "SIP call."

20 Essentially, EPA ordered 36
21 jurisdictions -- states and local jurisdictions,
22 such as Albuquerque and Bernalillo County -- to
23 remove affirmative defenses from their SIPs. And it
24 set a deadline for doing so of November 22nd of this
25 year.

1 Now, the Department's proposed amendments
2 are intended to comply with the EPA SIP call. And
3 to do so, the Department has proposed a two-step
4 process.

5 First, we propose to remove the
6 regulation, Part 49, from the SIP. EPA recommends
7 this step because 49 concerns enforcement, and the
8 federal Clean Air Act does not require this type of
9 regulation, a regulation regarding enforcement, to
10 be in the SIP. The Department has not received any
11 comments in opposition to this proposal.

12 Second, we propose to remove the
13 affirmative defenses from Part 49 itself, and, in
14 its place, insert the concept of "enforcement
15 discretion."

16 As Mr. Reyes will explain, enforcement
17 discretion allows a source to present information to
18 the Department to show that the event was
19 unavoidable and that it has done everything possible
20 to reduce -- or to eliminate the problem and to
21 reduce the impact of the emission violation. And
22 then the Department -- or the court, if the matter
23 is before a court -- can then make a reasoned
24 decision on whether a penalty, a civil penalty, is
25 warranted and how much that penalty should be.

1 This second step ensures compliance with
2 all sections of the Clean Air Act. And you may ask
3 why -- why is that, if you're already going to be
4 complying with the SIP call by removing Part 49 from
5 the SIP?

6 And the answer is this: EPA's SIP call
7 only concerns affirmative defenses which are
8 applicable to violations of the Clean Air Act
9 regarding NAAQS, the National Ambient Air Quality
10 Standards, the PSD Increments, the NSPS, or New
11 Source Performance Standards, the NESHAP, the
12 National Emissions Standards for Hazardous Air
13 Pollutants, and the MACTS, the Maximum Achievable
14 Technology Control Standards.

15 The SIP call does not apply to
16 requirements in a Title V permit, which is part of
17 the Clean Air Act, or required by the Clean Air Act.

18 In March of 2016, as the Department was
19 preparing its amendments to Part 49 in deciding how
20 it was going to respond to the SIP call, it had a
21 discussion with EPA and with the principals at EPA
22 who are responsible for overseeing compliance of
23 jurisdictions in Region 6 with the SIP call.

24 And they were told that the same reasoning
25 for not allowing affirmative defenses for NAAQS,

1 PSD, NESHAP, MACTS, and NSPS, also applies to
2 Title V permits under Part 70 -- or Title V. I may
3 be using the wrong designation for the Air Board's
4 regulations; but the Title V permits under the Air
5 Board's regulations.

6 In fact, the EPA, in June of this year,
7 proposed a rule to explicitly require jurisdictions
8 to remove affirmative defenses for Title V permits
9 from their SIPs.

10 Our objective here today is to get ahead
11 of the curve. EPA has only required, in the SIP
12 call, that we take out the affirmative defenses from
13 NAAQS -- the NAAQS, PSD, NESHAP, MACTS, and NSPS.
14 We are proposing to take it out also for Title V.

15 The reason is this: The Department would
16 prefer not to have to go through a second hearing to
17 simply expand the scope of the -- of the -- of
18 Part 49 or -- let me rephrase that -- restrict the
19 scope of Part 49 just to deal with Title V permits.
20 We prefer to fix the issue once and for all right
21 now, in one hearing.

22 Now, the Department's received two
23 comments -- or I should say two objections -- to its
24 proposed changes. The first was submitted by
25 Western Refining. And -- but -- counsel for Western

1 Refining is in the audience and can address these
2 issues, if you would like.

3 But they submitted a letter on
4 January 27th, which is Exhibit 7 in the Department's
5 NOI; and the Department responded to that shortly
6 thereafter. And that is Exhibit 8, an attachment to
7 your NOI.

8 More recently, Western Refining submitted
9 an e-mail to the Department and attached a letter
10 from the EPA dated May 25th, 2016, to which the
11 Department also has responded. Those are -- that
12 is, I should say, Supplemental Exhibit 5, which
13 should be in your folder on your desk this evening.

14 Western Refining specifically pointed to
15 this letter from May 25th, 2016, in which EPA told
16 the State of New Mexico and the New Mexico
17 Environment Department and, by extension, the
18 New Mexico Environmental Improvement Board, that the
19 State could move the affirmative defense provisions
20 to a regulation outside the SIP and leave the
21 affirmative defenses in the regulation.

22 That is true; the letter does say that.
23 But the letter also goes on to say that these
24 affirmative defenses cannot be applied to Clean Air
25 Act requirements.

1 The EPA made that statement with respect
2 to all Clean Air Act requirements, just not those
3 requirements in the SIP call; as I'll repeat, the
4 NAAQS, the NESHAP, the MACTS, the NSPS, and PST --
5 P- -- excuse me -- PSD.

6 So, in other words, the EPA letter from
7 May 25th, 2016, is entirely consistent with what EPA
8 Region 6 told the Department and is entirely
9 consistent with what the Department is here
10 proposing tonight, that the affirmative defenses in
11 Part 49 should be removed with respect to all
12 requirements that arise under the Clean Air Act,
13 including Title V.

14 Now, the Air Board does not have to do
15 exactly what the State does. There is no obligation
16 for this Board to walk in lockstep with the
17 Environmental Improvement Board. The Environmental
18 Improvement Board is free to do as it wishes, and
19 EPA will review its decision and decide whether it's
20 complied with the SIP call.

21 There is nothing arbitrary and capricious
22 with this Board making a decision to remove the
23 affirmative defenses for all Clean Air Act
24 requirements now.

25 The second objection was raised by Public

1 Service Company of New Mexico. That objection was
2 raised in a letter -- or, I should say, an e-mail --
3 sent to the Environmental Health Department on
4 August 30th. And you will find our response to that
5 e-mail in your packets as Supplemental Exhibit 4.

6 I should also say that e-mail was sent
7 directly to the Air Board, as well; and so you
8 should have that e-mail in your packet, as well, the
9 e-mail from PNM. It's not labeled by us, because it
10 was sent directly to Mr. Daffern on behalf of the
11 Air Board.

12 In the e-mail, PNM argues that the
13 affirmative defenses should be kept in Part 49,
14 because the Department might exercise its
15 enforcement discretion differently, depending on who
16 makes the decision regarding a particular excess
17 emission event.

18 And first, I'd like to point out that it's
19 not just the Department that would be exercising
20 enforcement discretion regarding an excess emission
21 event; it could well -- very well be a court, for
22 instance, if the Department filed a complaint in
23 court regarding an excess emission.

24 But here, even here, there's not a
25 problem. There's no problem with the Department or

1 the court exercising enforcement discretion. That
2 is what the Department and the court are supposed to
3 do.

4 Our job, like the courts', is to evaluate
5 each case on its merits. Our job is to hear the
6 evidence brought forward by the source regarding the
7 event and make a decision.

8 The Department has experts whose job it is
9 to do this. The Department has managers whose job
10 it is to ensure that the experts act consistently.
11 The Department has a civil penalty policy which it
12 uses to ensure that its decisions are made
13 objectively pursuant to a set of understood
14 standards that are available to both the Department
15 and the source.

16 And, finally, if the source is unhappy
17 with the outcome, it can always file an appeal. So
18 in the end, if the Department's made the decision,
19 the source can always ask a court to review that
20 decision; or if the matter is initially in a
21 district court, the source can ask an appellate
22 court to review the decision.

23 So there are a number of checks and
24 balances in this process to ensure that the
25 Department or the court exercises its enforcement

1 discretion appropriately.

2 No two cases are alike; but the process is
3 the same. And the Department intends -- as it has
4 for years -- intends to continue to be fair in its
5 assessment of civil penalties for violations of
6 permits and regulations in this jurisdiction.

7 So now, the -- now the slightly harder
8 part, the warning. It's very important that the
9 Board take action on this proposal tonight, if at
10 all possible. The EPA has tremendous power to
11 sanction our jurisdiction, under the federal Clean
12 Air Act, if we do not meet this deadline. It can
13 take away federal highway money. It can tell the
14 U.S. Department of Transportation to not approve any
15 transportation projects unless they relate to air
16 quality improvement or mass transit. They can even
17 take away money from our air quality program,
18 limiting our ability to do the job we are doing now.

19 And the EPA has done this before. Long
20 before my time, and maybe before some of yours, back
21 in the mid-'80s, the EPA sanctioned the State of New
22 Mexico, because Bernalillo County and the City of
23 Albuquerque failed to submit an approvable
24 inspection and maintenance program for attainment of
25 the carbon monoxide standard.

1 The EPA issued a final rule taking away
2 federal money for transportation. It ordered the
3 Department of Transportation to not approve any
4 transportation projects. And it even prohibited the
5 City of Albuquerque and Bernalillo County from
6 issuing new permits for stationary sources.

7 I would say that that particular sanction
8 is no longer within the scope of the Clean Air Act.
9 I'm just giving you the details as to what happened
10 back in the mid-'80s.

11 Obviously, we want to avoid all these
12 unfortunate outcomes; and so I urge you to take
13 action tonight so that can meet this November 22nd
14 deadline.

15 Now, the Department does have a floor
16 amendment to its proposal that is before you in your
17 packets tonight as Supplemental Exhibits 1 and 2.

18 Supplemental Exhibit 1 is a redline, or
19 tracked change, version of our proposal, our
20 original proposal; so you can see how we're
21 proposing to change Section 16D of Part 49.

22 If you flip to Supplemental Exhibit 2,
23 that is a clean version of the same thing. That is
24 the way our proposal would look as amended tonight.

25 There is also a Supplemental Exhibit 3,

1 which is our proposed amended Statement of Reasons,
2 which reflects the floor amendment. So we've added
3 a paragraph to that -- to our original Statement of
4 Reasons to reflect the floor amendment tonight, if
5 you choose to accept it.

6 Our purpose in proposing this amendment is
7 straightforward. We want to clarify this section to
8 ensure that the Department can consider all
9 information provided by a permittee regarding an
10 excess emission event.

11 If you look at Supplemental Exhibit 1,
12 you'll see that, in the first sentence, it says,
13 we -- or the first or second sentence -- it says, We
14 shall "...consider all relevant evidence..." -- or
15 "...may consider all relevant evidence... ."

16 And then when you go down to the last full
17 sentence, second clause, above the bulleted list, or
18 the numbered list, it says, we "...shall not
19 consider..." information. Obviously, that's a
20 contradiction. We do not want to limit our ability
21 to consider information provided by a source
22 regarding an event in our effort to develop the
23 appropriate remedy for that violation.

24 We want to be able to consider that
25 information, for instance, to assess and to

1 negotiate a civil penalty. And we also need to
2 consider that information to decide whether or not
3 we want to require some kind of corrective action
4 for a violation of an emission limit.

5 And in a moment, I will ask our two
6 witnesses to present themselves to be sworn so we
7 can enter their testimony into the record. At that
8 time, I'll move, as well, for the admission of
9 Supplemental Exhibits 1 through 5.

10 Thank you.

11 I'd now like to call our two witnesses,
12 Mr. Reyes and Mr. Rocha. They are going to do a
13 presentation; so I will -- actually, if you
14 gentlemen would please go sit over there
15 momentarily, so we can swear you in?

16 (Mr. Dario Rocha and Mr. Damon Reyes sworn.)

17 MR. ERIC AMES: Thank you.

18 Pursuant to the Hearing Officer's
19 prehearing order of August 16th, the Department will
20 now call its witnesses -- or will present its
21 witnesses -- to authenticate their written
22 testimony. They'll then make presentations and
23 stand for questions.

24 So we'll begin by asking Mr. Reyes to
25 please identify himself.

1 MR. DAMON REYES: My name is Damon Reyes.
2 I'm the Enforcement and Compliance Division Manager.

3 MR. ERIC AMES: And Mr. Rocha?

4 MR. DARIO ROCHA: My name is Dario Rocha,
5 Division Manager for Controlled Strategies.

6 MR. ERIC AMES: Mr. Reyes and Mr. Rocha,
7 did you file written testimony and exhibits in this
8 proceeding?

9 MR. DAMON REYES: Yes.

10 MR. DARIO ROCHA: Yes.

11 MR. ERIC AMES: Did you catch that?

12 THE REPORTER: (Indicates.)

13 MR. ERIC AMES: Thank you.

14 Please answer one at a time. I'll ask you
15 individually, my mistake.

16 Mr. Reyes, was your testimony and exhibits
17 attached to the Department's Notice of Intent?

18 MR. DAMON REYES: Yes.

19 MR. ERIC AMES: Mr. Rocha, was your
20 testimony and exhibits attached to the Department's
21 Notice of Intent?

22 MR. DARIO ROCHA: Yes.

23 MR. ERIC AMES: Do you both swear,
24 individually, that your testimony is true and
25 correct as filed.

1 Mr. Reyes?

2 MR. DAMON REYES: Yes.

3 MR. ERIC AMES: Mr. Rocha?

4 MR. DARIO ROCHA: Yes.

5 MR. ERIC AMES: Thank you.

6 I now move the admission of the
7 Department's Notice of Intent and the testimony of
8 Mr. Reyes and Mr. Rocha, along with their exhibits.

9 HEARING OFFICER ORTH: All right. Thank
10 you, Mr. Ames. There being no other parties
11 available to object, they're admitted.

12 (Department's Notice of Intent and
13 Testimonies of Mr. Damon Reyes and
14 Mr. Dario Rocha admitted into evidence.)

15 MR. ERIC AMES: Great. Thank you.

16 I now would like to ask Mr. Rocha to
17 identify Supplemental Exhibits 1, 2, 3, 4, and 5.

18 Mr. Rocha, is Supplemental Exhibit 1 and 2
19 versions of our floor amendment presented today?

20 MR. DARIO ROCHA: Yes.

21 MR. ERIC AMES: Is Supplemental Exhibit 3
22 our Amended Statement of Reasons?

23 MR. DARIO ROCHA: Yes.

24 MR. ERIC AMES: Exhibit 4 is the -- I
25 believe that's the letter in response to the Public
Service Company of New Mexico; correct?

1 MR. DARIO ROCHA: Yes.

2 MR. ERIC AMES: And Exhibit 5 is the
3 e-mail -- the EPA letter and our response to Western
4 Refining.

5 MR. DARIO ROCHA: Yes.

6 MR. ERIC AMES: Great. Thank you.

7 These are true and accurate copies of all
8 those documents; correct?

9 MR. DARIO ROCHA: Yes. Yes.

10 MR. ERIC AMES: Thank you, Mr. Rocha. The
11 Department now moves the admission of Supplemental
12 Exhibits 1, 2, 3, 4, and 5.

13 HEARING OFFICER ORTH: They are admitted.
14 Thank you.

15 (Supplemental Exhibits 1 through 5
16 admitted into evidence.)

17 MR. ERIC AMES: Thank you. That concludes
18 my portion tonight. And I now turn the floor over
19 to Mr. Reyes and Mr. Rocha to make their
20 presentation up here and then stand for questions
21 from the Board, and any cross that may come.

22 Thank you.

23 HEARING OFFICER ORTH: Thank you,
24 Mr. Ames.

25 MR. DARIO ROCHA: Good evening, Madam

1 Hearing Officer, Madam Chair, members of the Board.
2 I will be doing a presentation on amending
3 20.11.49 NMAC, "Excess Emissions."

4 For the rest of my presentation, I will
5 refer to this regulation as "Part 49."

6 What is the purpose of Part 49? It is a
7 regulation that is used to report excess emissions
8 under certain circumstances, which I will describe
9 later.

10 This regulation also creates the
11 unfortunate process to address these emissions. The
12 reason for the proposed change is to align Part 49
13 with federal law.

14 As an overview, we'll be discussing how
15 Part 49 was found to be out of compliance with the
16 Clean Air Act since this regulation contains
17 affirmative defense provisions that are not
18 permissible under the Clean Air Act.

19 EHD's proposed solution is to remove the
20 affirmative defense provisions from Part 49 and
21 removing this regulation from the SIP.

22 The EPA determined that Part 49 is not in
23 compliance with the Clean Air Act. This
24 determination was done through a SIP call. Simply
25 stated, a SIP call is a determination by EPA that a

1 state's SIP does not adequately meet the
2 requirements of the Clean Air Act, and, thus, would
3 require a SIP revision.

4 Thirty-six states were affected by the SIP
5 call, including our own; and this SIP call was
6 issued because EPA lost a federal court case.

7 EPA requires a response to the SIP call no
8 later than November 22nd of 2016. Failure to do so
9 could result in possible sanctions.

10 Just as a brief review of the affirmative
11 defense -- defenses, as described by Mr. Ames, if a
12 source had an excess emission at their facility,
13 then the source may obtain relief from penalties, if
14 they can prove certain facts.

15 An excess emission, in simple -- in simple
16 terms, is any emission that violates a regulation or
17 a permit. Part 49 addresses these emissions by
18 allowing affirmative defenses under certain
19 circumstances. Examples of such cases are start-up
20 and shutdown, malfunction, and emergencies.

21 This is -- this paragraph is an example of
22 an excess emission during a start-up or shutdown.
23 In this case, this picture is of a coal-fired power
24 plant. If you look at the third stack from the
25 right, you'll notice a dark plume emanating from

1 this stack.

2 In this case, the emission control
3 equipment was deactivated as part of the normal
4 shutdown sequence for this unit, which resulted in
5 this plume being emitted.

6 This is an example of an excess emission
7 during a malfunction. This is a steel processing
8 facility, and it uses an emission control device
9 called a "baghouse," which is used to control dust
10 particles. In this case, the baghouse
11 malfunctioned, which resulted in this cloud of iron
12 oxide to be emitted into the atmosphere.

13 This is an example of an excess emission
14 during an emergency. Here, we have a picture of a
15 refinery; and in this case, lightning struck one of
16 the storage tank units which caused this large fire
17 to be created.

18 EHD's proposed solution is to remove the
19 affirmative defense provisions from Part 49 and
20 replace it with enforcement discretion language.
21 The next step is to request a SIP revision.

22 One of the elements of a SIP is a body of
23 air quality regulations that are approved by the
24 EPA; and that's represented by that blue circle that
25 you see. Currently, Part 49 resides in the SIP, and

1 EHD proposes to remove this regulation from the SIP.

2 In EPA's view, EHD meets all of the SIP
3 call requirements by removing the affirmative
4 defense provisions from Part 49 and replacing it
5 with enforcement discretion language. This will be
6 consistent with the Clean Air Act.

7 EPA has supported enforcement discretion
8 as an excess emissions approach since the 1970s.

9 And now to cover the enforcement process,
10 I will turn it over to Mr. Reyes.

11 MR. DAMON REYES: Madam Hearing officer,
12 Madam Chair, members of the Board, I'd like to
13 provide you with a brief overview of enforcement --
14 of enforcement and penalties.

15 (Reporter requests clarification.)

16 So what does "enforcement discretion"
17 mean? It refers to the process of deciding when a
18 penalty or an excess emission is justified. It also
19 requires applying penalties consistently.

20 What is the purpose of issuing a penalty?
21 Punishing the violator of an emission limit. It
22 also deters future violations.

23 As Mr. Ames has described -- he provided
24 you a detailed discussion -- I'm going to provide
25 you with a higher level description of the

1 enforcement process, as it relates to the current
2 Part 49 and the proposed Part 49.

3 On the left side -- do I need to advance
4 that? Excuse me.

5 On the left side of the slide, you will
6 see that under the -- under the current Part 49, if
7 an excess emission occurs, a permittee can file --
8 can file a claim, an affirmative defense claim. If
9 they choose to file that claim, they can -- they
10 will provide supporting documentation, which then
11 EHD reviews.

12 If that review proves and supports the
13 claim of affirmative defense; that is, that it
14 qualifies for affirmative defense, then they're
15 entitled to relief from penalties.

16 If the permittee, for some reason,
17 disagrees with the determination from the
18 Department, they can appeal it.

19 Now, under the proposed Part 49, as you
20 can see on the left side of the slide, that that
21 first line is not affirmative defense; it has been
22 replaced with enforcement discretion.

23 So if an excess emission does occur, the
24 permittee will file a report, as required by the
25 proposed Part 49. EHD will again go through a

1 review of that report; but in this case, the
2 determination on whether penalties are applied is
3 discretionary.

4 The next step, again, if there is a reason
5 that the permittee does not agree with the
6 Department's decision, or their determination, they
7 can appeal it.

8 I will turn the presentation back over to
9 Mr. Rocha and will be available for questions upon
10 his completion.

11 MR. DARIO ROCHA: EHD has proposed a floor
12 amendment for Part 49. This floor amendment was
13 needed in order to address language that was
14 inadvertently overlooked.

15 The old language actually limited EHD from
16 using information from a Supplemental Report under
17 certain circumstances. The new language in the
18 floor amendment will allow EHD to consider
19 information from the Supplemental Report, and thus
20 will allow EHD -- EHD to work with the source to
21 develop a remedy.

22 EHD did respond to comments in revising
23 Part 49. There were two parties that submitted
24 essentially very similar comments. Both of the
25 commenters suggested that Part 49 be withdrawn from

1 the SIP, but to keep the affirmative defense
2 language in the regulation.

3 EHD's response to this is that if we took
4 this course of action, it would violate Title V,
5 when applied to Clean Air Act requirements, and this
6 could result in a notice of a deficiency being
7 issued by EPA.

8 EHD recommends that the Board adopt EHD's
9 proposed changes to Part 49, including EHD's floor
10 amendment; also, to authorize EHD to request EPA to
11 remove Part 49 from the SIP and adopt EHD's proposed
12 Amended Statement of Reasons.

13 EHD has followed all of the State and
14 local procedural requirements. A petition was filed
15 on June 27th of 2016. The Air Board authorized a
16 hearing on July 13th of 2016. The public notice was
17 published July 29th of 2016. Public comments
18 received and responses were sent. Notice of Intent
19 to Present Testimony was filed, and Proof of Notice
20 filed in the Administrative Record.

21 And with that, I stand for questions.

22 HEARING OFFICER ORTH: Thank you,
23 Mr. Rocha and Mr. Reyes.

24 Are there questions of Mr. Rocha or
25 Mr. Reyes based on their testimony?

1 MS. KELSEY CURRAN: I did have a question,
2 Ms. Orth. And this is probably for Mr. Reyes,
3 because he was the one that presented on this
4 section. I was wondering if you could describe a
5 little bit more about the discretionary function in
6 that enforcement discretion, on when you would
7 choose to go forth with an enforcement process and
8 when you might not, just taken a given example for
9 the Board.

10 MR. DAMON REYES: Sure. Madam Hearing
11 Officer, Madam Chair, members of the Board, you
12 know, as Mr. Ames explained, every -- every one of
13 these things can be -- they are actually
14 case-by-case.

15 Where you might apply enforcement
16 discretion and not pursue it is something -- to use
17 the phrase, an "Act of God." It was something that
18 was unforeseen, uncontrollable, from the facility,
19 and an excess emission occurred. In that case, we
20 would not -- we would apply enforcement discretion
21 and not assess a penalty.

22 MS. KELSEY CURRAN: So to be consistent
23 with the presentation, it would be like the example
24 presented, where the lightning struck a -- at the
25 refinery.

1 MR. DAMON REYES: Yes.

2 MS. KELSEY CURRAN: Thank you.

3 HEARING OFFICER ORTH: Are there other
4 questions? Yes.

5 CHAIR CUDNEY-BLACK: I have a question. I
6 couldn't immediately find any language in the
7 regular -- in the rules that talk -- speak to SSM.
8 But I know that the State has SSM language. Is
9 there a plan to add Start-up/Shutdown Maintenance
10 requirements to the permitting process; or is this
11 something that -- that would be a separate
12 rule-making, or -- I know that -- does this make any
13 sense?

14 MR. DAMON REYES: You're -- I'm sorry.
15 Your question, Madam Chair, is not quite clear.

16 CHAIR CUDNEY-BLACK: Start-up, Shutdown
17 and Maintenance -- Start-up, Shutdown and
18 Maintenance emissions are usually permitted as part
19 of a source's emissions total, for the State.

20 MR. DAMON REYES: I -- I understand, yeah.
21 This is something may be better answered by our
22 Permitting Division Manager, or even Mr. Rocha with
23 development of the regs.

24 MR. DARIO ROCHA: Madam Hearing Officer,
25 Madam Chair, members of the Board, to quantify

1 start-up/shutdown emissions is actually -- could be
2 a difficult task. It's not entirely clear how --
3 you know, how to calculate such emissions; because
4 if you -- if you -- if you could, you would have to
5 model those emissions; but not every situation is
6 the same. It's -- it's a case-by-case basis.

7 There could be various scenarios that
8 would -- that could come into play when it comes to
9 estimating those types of emissions in order to
10 permit them.

11 So I believe EPA has not yet worked out a
12 procedure for how to approach that, as of yet.

13 HEARING OFFICER ORTH: I must be behind on
14 my permitting actions. Certainly, from the State's
15 perspective, it's my understanding that they leave
16 it to the permittee to quantify what they think
17 their SSM emissions are going to be.

18 MR. DARIO ROCHA: Madam Hearing Officer,
19 Madam Chair, members of the Board, if the source is
20 capable of estimating those emissions, then the Air
21 Quality Bureau would certainly consider that and
22 review that as part of the permitting process.

23 CHAIR CUDNEY-BLACK: So my overlying
24 question about this action is, is there -- is there
25 a movement, going forward, to implementing SSM

1 emissions in the permitting process for new
2 permittees or existing permittees, or as part of the
3 Title V process? Or is that not being considered
4 yet?

5 MR. DARIO ROCHA: Madam Hearing Officer,
6 Madam Chair, members of the Board, I'm not aware of
7 any action, for that comment. That may be a
8 question that could be directed to the Permitting
9 Manager.

10 MR. ERIC AMES: Ms. Orth, it sounds like
11 Mr. Rocha may not be the appropriate person to
12 answer this question. But Mr. Tavaréz is here, and
13 he's the Permitting Manager, and he may be able to
14 address Ms. Cudney-Black's question directly.

15 So if you wouldn't mind us allow- --
16 calling Israel to the stand, swear him in, and allow
17 him to answer the question, I think we can get to
18 the bottom of this quickly.

19 HEARING OFFICER ORTH: Thank you. Yes,
20 please.

21 (Mr. Israel Tavaréz sworn.)

22 MR. ISRAEL TAVAREZ: Good evening, Madam
23 Hearing Officer, Madam Chair, members of the Board.

24 My name is Israel Tavaréz. I am the
25 Manager for the Air Quality Permitting Division

1 within the Air Quality Program for the Environmental
2 Health Department.

3 I guess I would like to just echo what
4 Mr. Rocha has stated. While EPA has made an
5 assessment that excess emissions need to be
6 quantified, on the technical side, being able to
7 quantify those excess emissions is difficult.

8 So where applicants are able to quantify
9 those excess emissions, those are being factored in
10 to processing of an air quality permit application
11 and incorporated into the air quality permit, as is
12 reasonable.

13 But it's still a very difficult technical
14 challenge, because one of the most straightforward
15 ways to estimate emissions is through "stack
16 testing," is a phrase that we use. And as the name
17 somewhat implies, a probe is -- is put into a stack,
18 and the air emissions are able to be measured from
19 that.

20 One of the key elements in being able to
21 do that stack testing is the operation needs to be
22 in a relatively steady-state situation. Well, as
23 you can imagine, if there's excess emissions,
24 especially if something catastrophic, like a -- you
25 know, fire or an explosion, that is not steady

1 state; that is a very dynamic type of process.

2 So I guess the short answer is yes, we
3 need it to be incorporated into our program. But we
4 are dealing with the technical challenges of how to
5 go about estimating those excess emissions.

6 CHAIR CUDNEY-BLACK: Thank you for that
7 answer.

8 I have another question about who in
9 the -- the affected community is likely to be
10 impacted by this rule-making? How many excess
11 emissions reports do you receive annually? Have you
12 got an estimate on that?

13 MR. DAMON REYES: Madam Chair, I mean,
14 excess emissions can, you know, come from a variety
15 of sources. Typically, excess emissions, the --
16 knowing that a report is required is going to be
17 usually from your moderate-and-up, larger emissions
18 sources.

19 So your synthetic minors, your Title V's
20 are aware that if this event occurs, that there is a
21 Part 49 excess emission, and they need to report
22 that to us.

23 We -- my background of being with the
24 State, State NMED with the Air Quality Bureau, that
25 fax machine that they are using for excess emissions

1 was constantly coming in. We're nowhere near that.

2 We get -- I don't have solid numbers. But
3 a feel for the number of excess emission reports
4 that we get in a year are probably less than a
5 dozen.

6 CHAIR CUDNEY-BLACK: Thanks for that. I
7 appreciate the response to the question.

8 One more question, and then I'll let
9 everybody else talk.

10 Will there be a policy available to the
11 permitted world to follow, or for some guidance,
12 some specific guidance on what you would like to see
13 as a supplemental report for enfor- -- to be
14 considered for enforcement discretion?

15 MR. DAMON REYES: Madam Chair, that's a
16 very good question. With our current Part 49
17 regulation, we do have a form for submitting excess
18 emissions that guides the submitter through the
19 necessary information, and also refers them to the
20 regulation, and also they can -- and they do --
21 contact us for clarity, as well.

22 If this proposed Part 49 is accepted, we
23 would have to do some minor tweaks to that document.

24 CHAIR CUDNEY-BLACK: Thank you for that.
25 Are there other questions from Board members?

1 Member Deichmann?

2 MR. JENS DEICHMANN: Thank you, Madam
3 Chair, Madam Hearing Officer.

4 Mr. Reyes, in your -- your side by side
5 slide there, comparing the current and proposed
6 enforcement processes, at the bottom, you allude to
7 possible appeals.

8 And I'm just wondering. You referenced a
9 possible appeal by the permittee. Are appeals
10 possible by third parties, as well? For example, if
11 there's some negotiated settlement, and a
12 neighborhood association, for example, or a
13 community group objected to that level of
14 assessment, do they have a right to appeal?

15 MR. DAMON REYES: Madam Hearing Officer,
16 Madam Chair, members of the Board, there -- through
17 that enforcement process, if -- if appeal was taken
18 by the permittee, that would be between the facility
19 and the Department.

20 Now, within the regulation, there is
21 language in there that, with our regulation, does
22 not exclude other entities to take enforcement
23 actions. But the appeal of -- of that enforcement
24 action that would be between the permittee and the
25 Department, my understanding is, you know, through

1 that enforcement action, it's just between these two
2 entities. And we go through our enforcement
3 procedures to finish out that process, so to speak,
4 without going into too much detail what that process
5 is. But it's -- it's between the two parties.

6 MR. JENS DEICHMANN: So I guess, by
7 extension of that, a third party, if there was such
8 a third party, would have to indeed be a party to
9 the -- to the case to begin with; right?

10 MR. DAMON REYES: Yeah, I believe so. I'd
11 rely on my counsel for that. But they would have to
12 take an independent action, outside of our
13 enforcement action.

14 MR. JENS DEICHMANN: Okay. So for
15 example, if a community group filed a -- some sort
16 of a complaint to begin with, then they could be
17 considered a party to this action and would then
18 have a dog in the fight during the negotiations; is
19 that -- would that be correct? Or am I off in
20 some --

21 MR. DAMON REYES: Like I said, I'd have to
22 rely on -- on my counsel for that. That's ge- --
23 that hasn't occurred while I've been here, as
24 between the permittee and the Department itself. We
25 haven't had a third party get involved with that.

1 And I don't think they can. I think they are --
2 they would have to take a separate action outside of
3 ours.

4 MR. JENS DEICHMANN: I see. That's just a
5 hypothetical that kind of occurred to me when you
6 were talking. Any -- any possible clarification of
7 that, Mr. Ames?

8 MR. ERIC AMES: Sure. Ms. Hearing
9 Officer, how do you feel about me answering this
10 question? I can always talk to Mr. Deichmann after
11 the proceeding, if that would be more appropriate.

12 HEARING OFFICER ORTH: No. I would love
13 to have the Division's response to that question. I
14 have an answer, too; but I suspect it's the same.

15 MR. ERIC AMES: Okay. Before I try and
16 answer, let me ask if Mr. Tavaréz would like to
17 answer. Would you like to take a crack at this?

18 MR. ISRAEL TAVAREZ: Take it away.

19 MR. ERIC AMES: Okay. All right. I'll go
20 first, Ms. Orth, and then you can correct me.

21 There's two avenues for enforcement action
22 for air quality violations. One is under the State
23 Act, the New Mexico Air Quality Control Act; and the
24 other one would be under the federal Clean Air Act.
25 You first need a legal basis to bring a claim.

1 For actions under the State Act, only the
2 State, or the Environmental Health Department, can
3 bring an action. And that action would be between
4 the Environmental Health Department and the alleged
5 violator. There is, as far as I'm aware, no process
6 for third parties to be involved in that enforcement
7 process.

8 Under the Clean Air Act, citizens are
9 expressively authorized to bring enforcement
10 actions, on their own behalf, on behalf of their
11 organizations, their communities, and so forth. In
12 that context, a citizen, or a citizen group, a
13 community group, an Indian tribe, a government
14 entity, could bring an action against -- including
15 the Environmental Health Department -- could bring
16 an action against an alleged violator. And anyone
17 else who wanted to be involved in that could try and
18 intervene.

19 Whether the court allowed them to
20 intervene is a matter for another day; but anyone
21 could attempt to intervene. And if they did, they
22 would then be part of any negotiations that go
23 forward.

24 MR. JENS DEICHMANN: Okay.

25 MR. ERIC AMES: So for -- if we're to

1 break it down one more level, under the State Act,
2 the Environmental Health Department can bring an
3 action administratively, by filing a compliance
4 order, which is heard by the Environmental Health
5 Director, with an appeal to our State courts.

6 Alternatively, the Environmental Health
7 Department can file an action in State court.

8 Those actions all occur between the
9 Environmental Health Department and the violator.

10 Now, the Environmental Health Department
11 can always go to federal court, as well. And if it
12 were to do so, any citizen or citizen group, tribe,
13 other governmental entity, could attempt to join in.
14 So I tried to say it two different ways, but I --
15 and I hope I made it clear.

16 MR. JENS DEICHMANN: Yea, that helps.
17 Thank you.

18 MR. ERIC AMES: Felicia?

19 HEARING OFFICER ORTH: The only thing I
20 would add is that I did several compliance order
21 hearings for NMED, air quality compliance order
22 hearings, in which citizens offered eyewitness
23 testimony and video evidence of a variety of
24 violations, much to the outrage of the company that
25 was the subject of the compliance order.

1 And although I took that testimony and
2 forwarded it all to the Secretary and included it,
3 you know, in the basis for the decision, I was also
4 given to understand that the Air Quality Bureau
5 would never entirely base a compliance order on
6 citizen enforcement efforts, that their own
7 inspectors would really have to make findings of
8 violations themselves before they proceed.

9 So that's the only thing I would add to
10 the State process, compliance order process.

11 And the federal process, the only thing I
12 would add is that my memory is -- and I had a case
13 about this, too -- that before the citizens can
14 bring suit, they have to notify the state or the
15 division that they intend to bring a suit, in case
16 the state or the division isn't, if you will, doing
17 its job. And then if the state or division does do
18 its job and brings an enforcement action, at that
19 point, the citizens are on the -- on the hindsight
20 of that.

21 MR. JENS DEICHMANN: Sidelined? Yeah.
22 Uh-huh. Thanks.

23 HEARING OFFICER ORTH: Do you agree with
24 that --

25 MR. ERIC AMES: Yes.

1 HEARING OFFICER ORTH: -- Mr. Ames? Yeah.
2 Otherwise, I would give the same answer.

3 MR. JENS DEICHMANN: And thank you. And
4 one last question, if I may.

5 CHAIR CUDNEY-BLACK: (Indicates.)

6 MR. JENS DEICHMANN: And this is for
7 Mr. Rocha. In the following page on the slides, I'm
8 just curious, in the floor amendment, it says, "The
9 original language limited EHD from using information
10 in its supplemental report."

11 And maybe there's something obvious about
12 that, but not to me. I'm just wondering, what is --
13 why would that have been the case?

14 MR. DARIO ROCHA: When this regulation was
15 drafted, this was just an oversight on the
16 Department's part in not recognizing that -- that
17 the Department would be limited as far as what kind
18 of information to consider on a supplemental report
19 for an excess emissions.

20 MR. JENS DEICHMANN: I'm sorry. I
21 couldn't hear that.

22 MR. DARIO ROCHA: -- I'm.

23 MR. JENS DEICHMANN: If you can stick your
24 head down on that microphone, that would be good.

25 MR. DARIO ROCHA: This regulation, when it

1 was drafted, this provision was overlooked, in that
2 it was not recognized that when you read the
3 language of this provision, that it was actually
4 limiting the Department from using information on a
5 supplemental report.

6 So in order to correct that, we are
7 proposing this floor amendment. So, you know, we --
8 when we -- when we started revising Part 49, we did
9 not recognize this until recently. And that's the
10 purpose for admitting this floor amendment, in order
11 to correct this oversight.

12 MR. JENS DEICHMANN: Okay. So that's all
13 it was.

14 MR. DARIO ROCHA: Yes.

15 MR. JENS DEICHMANN: Okay. That makes
16 more sense. Thank you. Thank you, Madam Chair,
17 Madam Hearing Officer.

18 HEARING OFFICER ORTH: Are there other
19 questions for the Division panel?

20 No?

21 Anything from the audience?

22 All right. Thank you all very much,
23 gentlemen.

24 MR. DARIO ROCHA: Thank you.

25 HEARING OFFICER ORTH: We invite public

1 comment at this time. Is there public comment to be
2 offered?

3 All right. Hearing none, is there any
4 reason not to close the record, Mr. Ames?

5 MR. ERIC AMES: No, Ms. Orth. I did have
6 a closing statement; but I'm afraid that that may
7 take more time than is necessary.

8 So I'd simply say that the -- the
9 Environmental Health Department respectfully
10 requests that the Board approve the proposed changes
11 to Part 49 so that we can meet the November 22nd
12 deadline. Our proposal meets the requirements of
13 the EPA's SIP call and ensures that, by taking the
14 affirmative defenses out of Part 49, that we do
15 not -- we do not have to appear here again to make
16 that change after EPA adopts its final rule in that
17 regard.

18 Thank you.

19 HEARING OFFICER ORTH: Thank you,
20 Mr. Ames. I'll close the record, then.

21 Madam Chair?

22 CHAIR CUDNEY-BLACK: Thank you, Ms. Orth.

23 Before I open the floor for discussion, I
24 will ask Ms. Orth, in her capacity as the Board's
25 attorney, to give her legal perspective on the

1 Department's request.

2 MS. FELICIA ORTH: Yes, Madam Chair.

3 I think the petition is sound; it's been
4 well-supported by the Division's testimony and
5 presents an excellent opportunity for the Board to
6 fix an immediate problem and to avoid one shortly
7 down the road.

8 I also recommend -- and I have reviewed
9 it -- that the Board adopt a Supplemental Exhibit 3,
10 as its own Statement of Reasons. And I'll help you
11 fill out the blank spots there on Page 7.

12 MR. JENS DEICHMANN: Excuse me. Could I
13 hear that again? You ask that we also approve
14 Supplemental Exhibit 3, and what else?

15 MS. FELICIA ORTH: As your proposed
16 Statement of Reasons. And there are some blank --

17 MR. JENS DEICHMANN: Oh, the Statement of
18 Reasons. Okay.

19 MS. FELICIA ORTH: Yes.

20 CHAIR CUDNEY-BLACK: So this incorporates
21 the floor amendments. Supplemental 3?

22 MS. FELICIA ORTH: Yes, it does.

23 CHAIR CUDNEY-BLACK: Got you. Okay.

24 I will now open the floor for discussion.

25 Any questions from Board members?

1 MS. MICHELLE MIANO: I have a quick
2 question. The title -- the application to Title V,
3 we are -- could you just provide a bit of
4 clarification, Felicia?

5 We are adopting that we are -- it's
6 proposed to adopt this. It's not necessarily part
7 of the SIP call; but it will be down the road, and
8 so we're doing it now.

9 MS. FELICIA ORTH: Exactly.

10 MS. MICHELLE MIANO: Okay. Okay. Thank
11 you. I'm sorry.

12 CHAIR CUDNEY-BLACK: Further questions
13 from the Board?

14 Hearing none, is there a motion?

15 MS. KELSEY CURRAN: I move to adopt
16 Supplemental Exhibit No. 3 as -- as displayed this
17 evening, with regards to AQCB Petition No. 2016-3.

18 MS. MICHELLE MIANO: Second.

19 CHAIR CUDNEY-BLACK: Motion made by Member
20 Curran, seconded by Member Miano.

21 Let's please vote. All in favor of this
22 motion, say "Aye"?

23 (Members so indicate.)

24 CHAIR CUDNEY-BLACK: Any opposed?

25 (No response.)

1 CHAIR CUDNEY-BLACK: Any abstentions?

2 (No response.)

3 CHAIR CUDNEY-BLACK: The motion carries.

4 Thank you very much.

5 (Proceedings concluded.)

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1 STATE OF NEW MEXICO
2 ALBUQUERQUE-BERNALILLO COUNTY
3 AIR QUALITY CONTROL BOARD

4 AQCB NO: 2016-3

5 IN THE MATTER OF THE PETITION TO
6 AMEND 20.11.49 NMAC, EXCESS
7 EMISSIONS and Request its Removal
8 from the State Implementation Plan
9 and adoption of Statement of
10 Reasons.

11 REPORTER'S CERTIFICATE

12 I, Cynthia C. Chapman, RMR, CCR #219, Certified
13 Court Reporter in the State of New Mexico, do hereby
14 certify that the foregoing pages constitute a true
15 transcript of proceedings had before the said Hearing
16 Officer and the Albuquerque-Bernalillo County Air
17 Quality Control Board, held in the State of New
18 Mexico, County of Bernalillo, in the matter therein
19 stated.

20 In testimony whereof, I have hereunto set my
21 hand on September 19, 2016.

22 Cynthia C. Chapman, RMR-CRR, NM CCR #219
23 BEAN & ASSOCIATES, INC.
24 201 Third Street, NW, Suite 1630
25 Albuquerque, New Mexico 87102

Job No.: 6084L

1 RECEIPT

2 JOB NUMBER: 6084L CC Date: 9/14/16

3 PROCEEDINGS: Air Quality Control Board

4 Meeting/Decision

5 CASE CAPTION: In Re: Environmental Health
6 Department's Petition to Amend 20.11.49 NMAC - Excess
7 Emissions and Request its Removal from the State
8 Implementation Plan and Adoption of the Statement of
9 Reasons

10 *****

11 ATTORNEY: MR. ANDREW DAFFERN

12 DOCUMENT: Transcript / Exhibits / Disks / Other _____

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ALBUQUERQUE-BERNALILLO COUNTY ENVIRONMENTAL HEALTH
AIR QUALITY CONTROL BOARD

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IN THE MATTER OF PETITION TO AMEND
20.11.49 NMAC – *EXCESS EMISSIONS*

AQCB Petition No.2016-3

Environmental Health Department,
City of Albuquerque, Petitioner

**ENVIRONMENTAL HEALTH DEPARTMENT'S
PETITION TO AMEND 20.11.49 NMAC – *EXCESS EMISSIONS* AND
REQUEST ITS REMOVAL FROM THE STATE IMPLEMENTATION PLAN**

The City of Albuquerque's Environmental Health Department ("EHD") petitions the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board") to authorize a hearing on EHD's proposed regulatory change to remove affirmative defense provisions from 20.11.49 NMAC, *Excess Emissions*, and make certain minor changes for clarity and consistency. As EHD explains below, this amendment is necessary because the United States Environmental Protection Agency ("EPA") has taken final action determining that "affirmative defense" provisions in 20.11.49 NMAC ("Part 49") are substantially inadequate to comply with the federal Clean Air Act ("CAA") and must be removed from the Albuquerque – Bernalillo County element of the New Mexico State Implementation Plan ("SIP"). This EPA action requires Albuquerque – Bernalillo County to revise the SIP to come back into compliance with the CAA or face possible sanctions. EHD's proposed draft of a revised 20.11.49 NMAC ("Proposed Rule") to comply with the EPA determination is attached to this petition.

1. An affirmative defense is a legal concept. Black's Law Dictionary defines "affirmative defense" as, "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Black's Law Dictionary* (10th ed. 2014).¹

2. Under the current version of 20.11.49 NMAC, an owner or operator may claim an affirmative defense for certain types of "excess emissions," i.e., violations of an emission limit in a regulation or permit. If the owner or operator can prove the facts specified in 20.11.49.16 NMAC, the owner or operator may be relieved of any liability for civil penalties in an administrative or judicial enforcement action for that excess emission.

3. To be excused from civil penalties under the current Part 49, the owner or operator must meet certain criteria in the affirmative defense claim, demonstrating that exceptional, extenuating circumstances existed. Those criteria include showing that the excess emission occurred during one of four specific modes of operation – startup, shutdown, malfunction or emergency. 20.11.49.16(A-C) NMAC. Claiming an affirmative defense requires the owner or operator to demonstrate certain additional facts, e.g., the excess emission is not part of a recurring pattern and the source took all reasonable steps to prevent the excess emission. If the source proves the necessary facts, the owner or operator has established the affirmative defense and will be relieved from civil penalties in an enforcement action by EHD, whether in an administrative or judicial forum.

¹ A classic example is a statute of limitations which bars a legal claim after a certain amount of time has passed, regardless whether a defendant violated the law. If a defendant can prove that an applicable statute of limitations has lapsed, the defendant would be entitled to dismissal of the alleged violation regardless of the defendant's culpability or the consequences of the violation.

4. EHD enforcement actions, including penalties, are authorized by the state Air Quality Control Act, NMSA 1978 §§ 74-2-12 to 74-2-14; Revised Ordinances of the City of Albuquerque (“ROA”) §§ 9-5-1-14, -15, -98, -99; and Bernalillo County Ordinances, §§ 30-42 to -46. The federal CAA requires states to maintain sufficient legal authority under state law to enforce CAA requirements. *See, e.g.*, CAA, 42 U.S.C.A. §§ 7410(a)(2), 7661a(D).

5. On February 4, 2010, EPA approved Part 49 as part of the Albuquerque – Bernalillo County element of the New Mexico SIP. 75 Fed. Reg. 5,698 (February 4, 2010).

6. EPA has recently determined that affirmative defense provisions in a SIP are not permissible under the CAA. On May 22, 2015, EPA issued a final action, known as a “SIP Call,” determining that affirmative defenses in SIP regulations in 36 states were substantially inadequate to comply with the federal Clean Air Act. *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, 80 Fed. Reg. 33,840 at 33,844 (June 12, 2015). The affected states have until November 22, 2016 to submit to EPA a proposed revision to bring the SIP back into compliance with the CAA. *Id.* at 33,848. Failure to do so may result in EPA issuing a Federal Implementation Plan. EPA may also impose sanctions under the CAA, 42 U.S.C. § 7509(b), including restrictions on federal highway funding. *Id.*

7. The Albuquerque-Bernalillo County portion of the New Mexico SIP was included in EPA’s SIP Call. 80 Fed. Reg. at 33,968. Thus, Part 49 must be amended. *Id.*

8. EPA’s SIP Call says that affirmative defense provisions in a SIP violate the CAA because they unlawfully limit the jurisdiction and enforcement discretion of EPA, citizens, or federal courts under CAA, 42 U.S.C. §§ 7413 and 7604. 80 Fed. Reg. 33845, 33847.

9. EPA identifies three affirmative defense provisions in 20.11.49 NMAC that violate the CAA for the above described reasons. These provisions are: 20.11.49.16(A), 20.11.49.16(B), and 20.11.49.16(C) NMAC. 80 Fed. Reg. at 33,968 and *see, e.g., State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Supplemental Proposal to Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States*, 79 Fed. Reg. 55,920, at 55,930 and 55,944 (September 17, 2014).

10. EPA states that removal of these provisions from the SIP would bring the regulation back into CAA compliance. Such removal would make certain other provisions superfluous and thus EPA recommends removing them as well: 20.11.49.15(B), -16(D), -16(E), -18 NMAC. 80 Fed. Reg. at 33,968.

11. Beyond recommending removal of the above provisions from the SIP, EPA's SIP Call offers additional guidance on substituting new, CAA-compliant provisions to replace affirmative defense provisions. *See, e.g.,* 80 Fed. Reg. 33,978 to 33, 982. Among other things, EPA notes that states may replace affirmative defense provisions with enforcement discretion criteria to guide, but not bind, state air agency personnel in the exercise of their enforcement discretion when addressing excess emissions violations. *Id.* at 33,980. Enforcement discretion criteria for these circumstances must apply only to state or local enforcement actions, not to EPA, citizens, or the courts. *Id.* at 33,981.

12. In consultation with EPA, EHD has drafted its Proposed Rule to meet all of the above requirements. EHD's Proposed Rule removes all affirmative defense provisions from the regulation and replaces them with Albuquerque-Bernalillo County-only enforcement discretion criteria as recommended by EPA. EHD's proposed draft also makes certain minor changes for clarity and consistency.

13. As required by 20.11.82.18(B) NMAC, EHD's Proposed Rule is attached to this petition and indicates the proposed regulatory changes in legislative-edit form, with strike-through and underlines to indicate amended language. See EHD's Proposed Rule, p. 1, ln 28-30; p. 2, ln 54, 56; p. 3 ln 5-12, 17-22, 25, 28, 32-34, 48-49, 50-56; p. 4, ln 1-3, 11, 13-48; p. 5, 13-22, 39-56; p. 6, 1-45; p. 7, ln 7, 18, 20-25.

14. EPA has recommended removal of the entire 20.11.49 NMAC from the SIP because the federal Clean Air Act does not require a SIP to contain enforcement discretion provisions related to excess emissions.

15. If the Air Board adopts EHD's Proposed Rule, EHD also petitions the Air Board to authorize EHD to request that EPA remove 20.11.49 NMAC from the SIP. The revised version of 20.11.49 NMAC, as reflected in EHD's Proposed Rule, would then be effective as state law but not federal law.

16. The Air Board is authorized to adopt this proposed regulatory change under NMSA 1978 § 74-2-5(B)(1), Revised Ordinances of the City of Albuquerque § 9-5-1-4, and Bernalillo County Ordinances § 30-33.

17. EHD estimates that the hearing will take no more than one hour.

18. EHD requests permission to provide a court reporter for the hearing.

19. EHD requests that the Air Board designate a hearing officer for the hearing.

Wherefore, EHD requests that the Air Board,

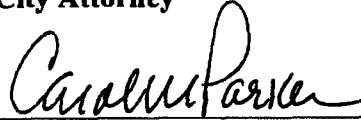
- a. Authorize a hearing to consider:
 - i. whether to adopt EHD's Proposed Rule;
 - ii. whether to authorize EHD to request that EPA remove Part 49 from the State Implementation Plan;
- b. Designate a hearing officer;
- c. Authorize EHD to provide a court reporter for its hearing.

Respectfully submitted,

CITY OF ALBUQUERQUE

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CERTIFICATE OF SERVICE

I certify that an original and fifteen copies of this *Petition to Amend 20.11.49 NMAC* were hand-delivered on June 27, 2016, to:

Andrew Daffern, Hearing Clerk
Albuquerque-Bernalillo County Air
Quality Control Board
One Civic Plaza, NW, Room 3023
Albuquerque, New Mexico 87103


Carol M. Parker
Assistant City Attorney

250235

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE - BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 49 EXCESS EMISSIONS

20.11.49.1 ISSUING AGENCY: Albuquerque - Bernalillo County Air Quality Control Board, c/o Environmental Health Department. P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505) 768-2601.

[20.11.49.1 NMAC - N, 10/13/09]

20.11.49.2 SCOPE:

A. 20.11.49 NMAC is applicable to every stationary source within Bernalillo county.

B. Exempt: 20.11.49 NMAC does not apply to sources within Bernalillo county that are located on indian lands over which the Albuquerque-Bernalillo county air quality control board lacks jurisdiction.

[20.11.49.2 NMAC - N, 10/13/09]

20.11.49.3 STATUTORY AUTHORITY: 20.11.49 NMAC is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance No. 94-5, Sections 4 and 5; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994, Sections 9-5-1-4 and 9-5-1-5.

[20.11.49.3 NMAC - N, 10/13/09]

20.11.49.4 DURATION: Permanent.

[20.11.49.4 NMAC - N, 10/13/09]

20.11.49.5 EFFECTIVE DATE: 10/13/09, unless a later date is cited at the end of a section.

[20.11.49.5 NMAC - N, 10/13/09]

20.11.49.6 OBJECTIVE: To implement requirements for the reporting of excess emissions ~~[and establish affirmative defense provisions]~~ for facility owners and operators ~~[for excess emissions]~~.

[20.11.49.6 NMAC - N, 10/13/09; A, XX/XX/16]

20.11.49.7 DEFINITIONS: In addition to the definitions in 20.11.49 NMAC, the definitions in 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.49 NMAC shall govern.

A. "Air pollution control equipment" means any device, equipment, process or combination thereof, the operation of which may limit, capture, reduce, confine, or otherwise control regulated air pollutants or convert for the purposes of control any regulated air pollutant to another form, another chemical or another physical state (e.g. sulfur recovery units, acid plants, baghouses, precipitators, scrubbers, cyclones, water sprays, enclosures, catalytic converters, and steam or water injection).

B. "Air quality regulation or permit condition" means any regulation adopted by the board, including a federal new source performance standard or national emission standard for hazardous air pollutants incorporated by reference, or any condition of an air quality permit issued by the department.

C. "Bypass" means the diversion of a regulated air contaminant around air pollution control equipment or process equipment.

D. "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same major group (i.e. , which have the same two-digit code) as described in the *standard industrial classification manual, 1972*, as amended by the 1977 supplement (U.S. government printing office stock numbers 4101-0065 and 003-005-00176-0, respectively).

E. "Emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God or nature, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include

1 noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless
2 or improper operation.

3 F. "Excess emission" means the emission of an air contaminant, including a fugitive emission, in
4 excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition.

5 G. "Malfunction" means any sudden and unavoidable failure of air pollution control equipment or
6 process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown.
7 A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable
8 equipment breakdown shall not be considered a malfunction.

9 H. [Reserved]

10 I. "Regular business day" means any day on which city of Albuquerque government offices are
11 open for normal business. Saturdays, Sundays, and official federal and city of Albuquerque holidays are not regular
12 business days.

13 J. "Shutdown" means the cessation of operation of any air pollution control equipment or process
14 equipment.

15 K. "Startup" means setting into operation any air pollution control equipment or process equipment.

16 L. "Stationary source" or "source" means any building, structure, facility, or installation which
17 emits or may emit a regulated air pollutant.

18 [20.11.49.7 NMAC - N, 10/13/09]

19
20 **20.11.49.8 VARIANCES:** [Reserved]

21 [20.11.49.8 NMAC - N, 10/13/09]

22
23 **20.11.49.9 SAVINGS CLAUSE:** Any amendment to 20.11.49 NMAC which is filed with the state records
24 center shall not affect actions pending for violation of a city or county ordinance, or 20.11.49 NMAC. Prosecution
25 for a violation under prior regulation wording shall be governed and prosecuted under the statute, ordinance, part, or
26 regulation section in effect at the time the violation was committed.

27 [20.11.49.9 NMAC - N, 10/13/09]

28
29 **20.11.49.10 SEVERABILITY:** If for any reason any section, subsection, sentence, phrase, clause, wording or
30 application of 20.11.49 NMAC is held to be unconstitutional or otherwise invalid by any court or the United States
31 environmental protection agency, the decision shall not affect the validity or application of remaining portions of
32 20.11.49 NMAC.

33 [20.11.49.10 NMAC - N, 10/13/09]

34
35 **20.11.49.11 DOCUMENTS:** Documents incorporated and cited in 20.11.49 NMAC may be viewed at the
36 Albuquerque environmental health department, 400 Marquette NW, Room 3023, Albuquerque, NM 87102.

37 [20.11.49.11 NMAC - N, 10/13/09]

38
39 **20.11.49.12 COMPLIANCE WITH OTHER REGULATIONS:** Compliance with 20.11.49 NMAC does
40 not relieve a person from the responsibility to comply with any other applicable federal, state, or local statute or
41 regulation.

42 [20.11.49.12 NMAC - N, 10/13/09]

43
44 **20.11.49.13 APPLICABILITY:**

45 A. Any source:

46 (1) whose operation results in an emission of a regulated air pollutant, including a fugitive emission,
47 in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition; or

48 (2) subject to the requirements of 20.11.47 NMAC, *Emissions Inventory Requirements*, 20.11.41
49 NMAC, *Authority-To-Construct*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant*
50 *Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

51 B. Deviations under 20.11.42 NMAC, *Operating Permits*, which do not result in excess emissions,
52 are not subject to the provisions of 20.11.49 NMAC.

53 C. 20.11.49 NMAC does not create a separate cause of action for failure to obtain a permit under
54 20.11.41 NMAC, ~~*Authority-To-Construct*~~, *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61
55 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

56 [20.11.49.13 NMAC - N, 10/13/09; A, XX/XX/16]

1
2 **20.11.49.14 OPERATION RESULTING IN AN EXCESS EMISSION:** The emission of a regulated air
3 pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit
4 condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be
5 subject to an enforcement action. ~~[The owner or operator of a source having an excess emission shall, to the extent~~
6 ~~practicable, operate the source, including associated air pollution control equipment, in a manner consistent with~~
7 ~~good air pollution control practices for minimizing emissions.] If the owner or operator of a source having an excess~~
8 ~~emission chooses to continue to operate it while the excess emission continues, the owner or operator shall take all~~
9 ~~appropriate measures consistent with good air pollution control practices for minimizing emissions. The duration~~
10 ~~and extent of any excess emission and the owner or operator's efforts to minimize the excess emission may be~~
11 ~~considered by the department in any resulting enforcement action.~~

12 [20.11.49.14 NMAC - N, 10/13/09; A, XX/XX/16]

13
14 **20.11.49.15 NOTIFICATION:**

15 A. The owner or operator of a source having an excess emission shall report the following
16 information to the department on forms provided by the department. The department may authorize the submittal of
17 such reports in electronic format. ~~[The department may require that the owner or operator of a source provide~~
18 ~~supplemental information in addition to that already required by 20.11.49.15 NMAC. The additional information~~
19 ~~shall be reported by the deadline specified by the department.] The department may require that the owner or~~
20 ~~operator of a source provide further information in addition to that already required by 20.11.49.15 NMAC by a~~
21 ~~deadline specified by the department.~~

22 (1) **Initial excess emission report:** The owner or operator shall file an initial report, no later than the
23 end of the next regular business day after the time of discovery of an excess emission. The initial report shall
24 include all available information regarding each item required by Subsection B of 20.11.49.15 NMAC.

25 (2) **Final excess emission report:** No later than 10 days after the end of the excess emission, the
26 owner or operator shall file a final report that contains specific and detailed information for each item required by
27 Subsection B of 20.11.49.15 NMAC.

28 B. ~~[The]~~ **Each excess emission report** shall include the following information:

- 29 (1) the name of the source;
30 (2) the name of the owner and operator of the source;
31 (3) the name and title of the person preparing the report;
32 (4) identifying information for the source (e.g. permit and database numbers);
33 (5) the specific date(s) ~~[and time(s) the excess emission occurred;]~~ time(s), and duration of the
34 excess emission;
35 (6) identification of the equipment involved and the emission point(s) (including bypass) from which
36 the excess emission occurred;
37 (7) the air quality regulation or permit condition that was exceeded;
38 (8) identification of the air contaminant(s) and the magnitude of the excess emission expressed in the
39 units of the air quality regulation or permit condition;
40 (9) the method for determining the magnitude and duration of the excess emission;
41 (10) the cause and nature of the excess emission;
42 (11) the steps taken to limit the duration and magnitude of the excess emission;
43 (12) the corrective action(s) taken to eliminate the cause of the excess emission; if one or more
44 corrective actions are required, the report shall include a schedule for implementation of those actions, with
45 associated progress reports; if no corrective actions are required, the report shall include a detailed explanation for
46 that conclusion.

47 (13) the corrective action(s) taken to prevent a recurrence of the excess emission;
48 (14) whether the owner or operator attributes the excess emission to malfunction, startup~~[or]~~ ,
49 shutdown or emergency;

50 (15) whether the owner or operator ~~[will claim an affirmative defense under Subsections A, B or C of~~
51 ~~20.11.49.16 NMAC; if claiming an affirmative defense, an analysis and the supporting evidence for each reason~~
52 ~~shall be submitted no later than 30 days after submittal of the final report required by 20.11.49.15 NMAC; no later~~
53 ~~than 30 days after the earlier of the department's receipt of the final report or the deadline for submitting the final~~
54 ~~report; if the department receives a request for an extension from the owner or operator of the source, the department~~
55 ~~may grant an extension to complete the analysis not to exceed 30 additional days; and] intends to file a supplemental~~
56 ~~report under Subsections A, B, or C of 20.11.49.16 NMAC; and~~

(16) ~~[the contents of the final report shall contain a signed certification of truth, accuracy, and completeness; the certification shall be signed by the person who is reporting the excess emission.] the person signing the final report shall certify that it is true, accurate, and complete.~~

C. If the period of an excess emission extends beyond 10 days, the owner or operator shall submit the final report required by Subsection B of 20.11.49.15 NMAC to the department within 72 hours of the date and time the excess emission ceased.

D. **Alternative reporting.** If an owner or operator of a source is subject to both the excess emission reporting requirements of 20.11.49.15 NMAC and the reporting requirements of 40 CFR Parts 60, 61, and 63, and the federal reporting requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice.

[20.11.49.15 NMAC - N, 10/13/09; A, XX/XX/16]

20.11.49.16 [AFFIRMATIVE DEFENSES:] EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, MALFUNCTION, OR EMERGENCY: All periods of excess emissions regardless of cause are violations ~~[of the act and the rules promulgated thereunder, the New Mexico Air Quality Control Act and rules promulgated thereunder, and applicable permit or other authorization of the air board. 20.11.49 NMAC provides an affirmative defense to owners and operators for civil or administrative penalty actions brought for excess emissions during periods of startup, shutdown malfunction or emergency, unless otherwise prohibited by Subsection D of 20.11.49.16 NMAC. 20.11.49.15 NMAC shall not be construed as limiting EPA's or citizens' authority under the act. The department may require the owner or operator of a source to provide supplemental information in addition to that already required by 20.11.49.16 NMAC. The additional information shall be reported by the deadline specified by the department.]~~ of the state Air Quality Control Act and rules promulgated thereunder, and any applicable permit. The owner or operator of a source who contends that an excess emission occurred during startup, shutdown, malfunction, or emergency may submit to the department a supplemental report addressing the criteria described in Subsections A, B, or C of 20.11.49.16 NMAC. To be considered by the department, the appropriate supplemental report described in Subsections A, B, or C of 20.11.49.16 NMAC below must be submitted to the department no later than thirty days after the final excess emissions report submitted pursuant to 20.11.49.15 NMAC. The department may grant written extensions to this deadline for good cause shown. An owner or operator of a source who contends that enforcement action for an excess emission is not warranted must provide information in a supplemental report as described in Subsections A, B, or C of 20.11.49.16 NMAC. If no supplemental report is timely received, the department will not consider the criteria described in Subsections A, B, and C of 20.11.49.16 NMAC. The department may require the owner or operator of a source to provide further information in addition to that already contained in the supplemental report or otherwise specified in 20.11.49.16 NMAC. The information in the supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable in a legal proceeding by any party or to limit the enforcement authority of any party. 20.11.49.16 NMAC shall not be construed to preclude EPA or federal court jurisdiction under section 113 of the federal act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under section 113 of the federal act, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304 of the federal act.

A. ~~[Affirmative defense]~~ Supplemental report for an excess emission during malfunction: ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during malfunction, against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during malfunction, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during malfunction, shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during malfunction addressing the following criteria:

- (1) the excess emission was caused by a malfunction;
- (2) the excess emission:
 - (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for; and
 - (b) could not have been avoided by better operation and maintenance practices;
- (3) to the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

(4) repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded; off-shift labor and overtime must have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(5) the amount and duration of the excess emission (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(6) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(7) all emission monitoring systems were kept in operation if at all possible;

(8) the owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence;

(9) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the owner or operator complied with [the] all notification requirements in 20.11.49.15 NMAC.

B. ~~[Affirmative defense]~~ Supplemental report for an excess emission during startup or shutdown: ~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during startup or shutdown against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during startup or shutdown, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during startup or shutdown shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during startup or shutdown, addressing the following criteria:

(1) the excess emission occurred during a startup or shutdown;

(2) the periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design;

(3) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) at all times, the source was operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;

(7) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(8) all emissions monitoring systems were kept in operation if at all possible;

(9) the owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and

(10) the owner or operator complied with [the] all notification requirements in 20.11.49.15 NMAC.

C. ~~[Affirmative defense]~~ Supplemental report for an emergency:

~~(1) An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission limitation if the owner or operator of the source demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

~~(a) an emergency occurred and that the owner or operator can identify the cause(s) of the emergency;~~

~~(b) the source was being properly operated at the time;~~

~~(c) during the period of the emergency the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the technology-based emission limitation; and~~

~~(d) the owner or operator fulfilled the notification requirements under Subsection A of 20.11.49.15 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.~~

~~(2) In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during an emergency addressing the following criteria:

(1) an emergency occurred;

(2) the excess emission occurred during the emergency;

- (3) the owner or operator has identified the cause of the emergency;
- (4) the excess emission resulted from the emergency;
- (5) the excess emission and resulting emergency could not have been prevented through careful planning and design;
- (6) the excess emission and resulting emergency were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (7) at the time the excess emission and emergency occurred, the source was being properly operated;
- (8) during the period of the excess emission, the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the applicable standard, regulation, or permit condition; and
- (9) the owner or operator complied with all notification requirements in 20.11.49.15 NMAC, including a description of the emergency, any steps to mitigate emissions, and corrective actions taken.

~~D. Affirmative defenses prohibited.~~ The affirmative defense provisions of this section shall not be available for:

- ~~(1) claims for injunctive relief;~~
- ~~(2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception;~~
- ~~(3) excess emissions that cause an exceedance of the NAAQS or PSD increments;~~
- ~~(4) failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63; or~~
- ~~(5) violations of requirements that derive from 40 CFR Parts 60, 61 and 63 or any other federally enforceable performance standard or emission limit.~~

~~E. Department's determination of adequacy of affirmative defense.~~ The department may issue a determination regarding an owner or operator's assertion of the affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to 20.11.49 NMAC or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to 20.11.49.18 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Paragraph (15) of Subsection B of 20.11.49.15 NMAC.]

D. Department's determination of adequacy of supplemental report. Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for an excess emission. The department may consider any relevant information, including information submitted in a supplemental report, in assessing or negotiating a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion and the department shall not consider information in a supplemental report in any enforcement action involving:

- (1) injunctive relief;
- (2) exceedance of limits which already take into account startup and shutdown emissions;
- (3) exceedance of the NAAQS or PSD increments;
- (4) failure to meet federally promulgated emission limits, including, but not limited to, emission limits in 40 CFR Parts 60, 61 and 63; or
- (5) violation of any requirement that derives from 40 CFR Parts 60, 61, and 63 or any other federally promulgated performance standard or emission limit.

[20.11.49.16 NMAC - N, 10/13/09; A, XX/XX/16]

20.11.49.17 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS:

A. Upon receipt of a written demand by the department, the owner or operator of a source having an excess emission, shall prepare an analysis that uses analytical tools determined by the department to be appropriate. The analysis shall contain the following information:

- (1) an analysis describing the root cause and all contributing causes of the excess emission; and
- (2) an analysis of the corrective actions implemented or available to reduce the likelihood of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.11.49.17 NMAC, including, as applicable:
 - (a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;

1 (b) the estimated cost associated with each corrective action alternative;
2 (c) the probable effectiveness of each corrective action alternative;
3 (d) if no corrective action alternatives are available, a clear explanation providing an adequate
4 justification for that conclusion; and
5 (e) if one or more corrective actions are identified, a schedule for implementation and progress
6 reports.

7 B. The department shall make the demand for [an] a root cause and corrective action analysis no later
8 than 90 days after receipt of the final report required by Subsection A of 20.11.49.15 NMAC.

9 C. The department may require the analysis authorized by Subsection A of 20.11.49.17 NMAC after
10 considering relevant factors. Examples of relevant factors include the significance of the excess emission, the nature
11 or pattern of excess emissions, and the history of the source, as well as any other factors determined to be relevant
12 by the department.

13 D. The completed analysis shall be submitted to the department no later than 60 days after the
14 department's demand is received by the owner or operator of the source, pursuant to Subsection A of 20.11.49.17
15 NMAC. For good cause shown, the department may grant an extension to submit the analysis.

16 E. The owner or operator of a source complying with 20.11.49.17 NMAC may assert a claim for
17 confidential information protection.
18 [20.11.49.17 NMAC - N, 10/13/09; A, XX/XX/16]

19
20 **20.11.49.18** ~~[FUTURE ENFORCEMENT ACTION: The department may commence an administrative or~~
21 ~~judicial enforcement action against the owner or operator of a source for an excess emission for which the~~
22 ~~department has made a determination pursuant to Subsection E of 20.11.49.16 NMAC if the department determines~~
23 ~~that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal~~
24 ~~operation, or other appropriate reason.] [Reserved]~~
25 [20.11.49.18 NMAC - N, 10/13/09; Repealed, XX/XX/16]

26 27 **HISTORY OF 20.11.49 NMAC:**

28 **Pre-NMAC History:** The material in this part was derived from that previously filed with the Commission of
29 Public Records - State Records Center and Archives.
30 Regulation No. 19, Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance; filed 3/24/82.

31
32 **History of Repealed Material:** 20.11.90.12 NMAC, Breakdown, Abnormal Operating Conditions, or Scheduled
33 Maintenance (filed 8/30/02) was repealed and replaced by 20.11.49 NMAC, effective 10/13/09.

**STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF THE PETITION TO AMEND
20.11.49 NMAC, *EXCESS EMISSIONS***

AQCB Petition No. 2016-3

**Environmental Health Department,
City of Albuquerque, Petitioner.**

RECEIVED
ENVIRONMENTAL HEALTH

16 JUL 29 PM 3:23

NOTICE OF DOCKETING

AQCB Docket No. 2016-3

AQCB Petition No. 2016-3 Received by Hearing Clerk: June 27, 2016

The procedural rule that will be followed for this hearing is 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*, which is attached.

Respectfully submitted,



Andrew Daffern, Hearing Clerk
Air Quality Program
Environmental Health Department
P.O. Box 1293
One Civic Plaza NW, Room 3023
Albuquerque, New Mexico 87102

CERTIFICATE OF SERVICE

I hereby certify that I have e-mailed a true and correct copy of the foregoing NOTICE OF DOCKETING on this 29th day of July, 2016, to the following:

E-mailed

Felicia Orth

orthf@yahoo.com

Hearing Officer

E-mailed

Carol M. Parker, Assistant City Attorney,

Air Quality Program

cparker@cabq.gov

Counsel for Petitioner

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew Daffern', is written over a horizontal line.

Andrew Daffern, AQCB Hearing Clerk

NOTICE TO PERSONS WITH DISABILITIES: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 82 RULEMAKING PROCEDURES – AIR QUALITY CONTROL BOARD

20.11.82.1 ISSUING AGENCY: Albuquerque-Bernalillo County Air Quality Control Board, c/o Environmental Health Department. P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505) 768-2601.

[20.11.82.1 NMAC - N, 8/11/08]

20.11.82.2 SCOPE: 20.11.82 NMAC governs the procedures in all rulemaking hearings before the board, except to the extent that 20.11.82 NMAC is inconsistent with specific procedures in governing law. In cases in which 20.11.82 NMAC is inconsistent with any rulemaking procedures specified in governing law, the procedures in governing law shall apply, rather than the procedures in 20.11.82 NMAC. A rulemaking hearing includes a hearing regarding a proposal to adopt, amend or repeal a board rule, regulation or standard.

[20.11.82.2 NMAC - N, 8/11/08]

20.11.82.3 STATUTORY AUTHORITY: 20.11.82 NMAC is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance No. 94-5, Sections 4 and 5; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994, Sections 9-5-1-4 and 9-5-1-5.

[20.11.82.3 NMAC - N, 8/11/08]

20.11.82.4 DURATION: Permanent.

[20.11.82.4 NMAC - N, 8/11/08]

20.11.82.5 EFFECTIVE DATE: August 11, 2008, unless a later date is cited at the end of a section.

[20.11.82.5 NMAC - N, 8/11/08]

20.11.82.6 OBJECTIVE: The purposes of 20.11.82 NMAC are to:

- A. standardize the procedures used in rulemaking proceedings before the board;
- B. encourage participation in the hearings conducted by the board for the promulgation of regulations;
- C. make possible the effective presentation of the evidence and points of view of parties and members of the general public; and
- D. assure that board hearings are conducted in a fair and equitable manner.

[20.11.82.6 NMAC - N, 8/11/08]

20.11.82.7 DEFINITIONS: As used in 20.11.82 NMAC:

- A. **“Act”** means the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, and its later amendments and successor provisions.
- B. **“Board”** means the Albuquerque-Bernalillo county air quality control board or its successor board pursuant to the act.
- C. **“Days”** means consecutive days except as otherwise specifically provided.
- D. **“Department”** means the city of Albuquerque environmental health department or its successor agency.
- E. **“Document”** means a pleading or exhibit and any other document including electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images and any other data or data compilations that are stored in any medium from which information can be obtained either directly or, if necessary, after translation, into a reasonably usable form.
- F. **“Environmental justice”** means the fair treatment of all residents (in the city of Albuquerque and Bernalillo county), including communities of color and low income communities, and their meaningful involvement in the development, implementation and enforcement of environmental laws, regulations and policies regardless of race, color, ethnicity, religion, income or education level.
- G. **“Exhibit”** means any document or tangible item submitted for inclusion in the record proper.
- H. **Reserved**

I. **"General public"** means any person attending a rulemaking hearing who has not filed a notice of intent to present technical testimony (NOI) or filed an entry of appearance pursuant to 20.11.82.20 NMAC or 20.11.82.21 NMAC.

J. **"Governing law"** means the statute, including any applicable case law, which authorizes and governs the decision regarding the proposed regulatory change.

K. **"Hearing clerk"** means the department employee designated by the director to provide staff support to the board, and is the person designated by the board to maintain the official record of the proceeding.

L. **"Hearing officer"** means the person who is designated by the board to conduct a hearing pursuant to 20.11.82 NMAC.

M. Reserved

N. **"NOI"** means a notice of intent to present technical testimony which is described in 20.11.82.20 NMAC.

O. **"Non-technical testimony"** means testimony that is not scientific, engineering, economic or other specialized testimony. A person who provides only non-technical testimony or a non-technical exhibit is not required to file an NOI or entry of appearance pursuant to 20.11.82.20 NMAC or 20.11.82.21 NMAC.

P. **"Participant"** means any person who participates in a rulemaking proceeding before the board.

Q. **"Party"** means:

- (1) the petitioner;
- (2) any person who filed an NOI pursuant to 20.11.82.20 NMAC; or
- (3) any person who filed an entry of appearance pursuant to 20.11.82.21 NMAC.

R. **"Person"** means an individual or any entity, including federal, state and local governmental entities, however organized.

S. **"Petitioner"** means the person who petitioned the board for the regulatory change that is the subject of the hearing.

T. **"Record proper"** or **"record"** means all documents related to the hearing, including documents received or generated by the board before the beginning, or after the conclusion of the hearing, including, but not limited to:

- (1) the petition for hearing and any response thereto;
- (2) the minutes (or an appropriate extract of the minutes) of the meeting at which the petition for hearing was considered, and of any meeting thereafter at which the proposed regulatory change was discussed;
- (3) the notice of hearing;
- (4) proof of publication;
- (5) NOI(s);
- (6) statements for the public record;
- (7) the hearing officer's report, if any;
- (8) post-hearing submissions, if allowed;
- (9) the stenographic transcription or audio recording of the hearing and the stenographic transcription or audio recording or appropriate extract of the audio recording of the meeting at which the board deliberated on the adoption of the proposed regulatory change; and
- (10) the board's decision and the reasons therefor.

U. **"Regulation"** means a rule, regulation or standard promulgated by the board that affects one or more persons, in addition to the board and the department, except for any order or decision issued in connection with the disposition of any case involving a particular matter as applied to a specific set of facts.

V. **"Regulatory change"** means the adoption, amendment or repeal of a regulation.

W. **"Service"** means delivering a copy of a document, including a pleading or exhibit, to a party as required by Subsection C of 20.11.82.16 NMAC.

X. **"Technical testimony"** means scientific, engineering, economic or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.

Y. **"Transcript of proceedings"** means the verbatim record, audio recording or stenographic transcription of the proceedings, testimony and argument in the matter, together with all exhibits offered at the hearing, whether or not admitted into evidence, and includes the record of any motion hearings or pre-hearing conferences.

[20.11.82.7 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.8 VARIANCES: The variance procedures provided by 20.11.7 NMAC shall not apply to 20.11.82 NMAC.
[20.11.82.8 NMAC - N, 8/11/08]

20.11.82.9 SEVERABILITY: If for any reason any section, subsection, sentence, phrase, clause, wording or application of 20.11.82 NMAC is held to be unconstitutional or otherwise invalid by any court or the United States environmental protection agency, the decision shall not affect the validity or application of remaining portions of 20.11.82 NMAC.
[20.11.82.9 NMAC - N, 8/11/08]

20.11.82.10 DOCUMENTS: Documents incorporated and cited in 20.11.82 NMAC may be viewed at the Albuquerque environmental health department, 400 Marquette NW, Suite 3023, Albuquerque, NM 87102.
[20.11.82.10 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.11 POWERS AND DUTIES OF BOARD AND HEARING OFFICER:

A. Board: The board shall exercise all powers and duties authorized by 20.11.82 NMAC and not otherwise delegated to the hearing officer or the hearing clerk. The board shall designate a hearing officer for each hearing. The board may direct the hearing officer to file a report of the hearing as provided by 20.11.82.31 NMAC.

B. Hearing officer: The hearing officer shall exercise all powers and duties delegated or otherwise authorized by 20.11.82 NMAC. The hearing officer may be a member of the board. The hearing officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited and avoid delay. The hearing officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial consideration of issues arising in proceedings governed by 20.11.82 NMAC, including:

- (1) conducting hearings pursuant to 20.11.82 NMAC;
- (2) taking, admitting or excluding evidence, examining witnesses and allowing post-hearing submissions;
- (3) making orders as may be necessary to preserve decorum and to protect the orderly hearing process;
- (4) if requested by the board, preparing a report of the hearing, with recommendations for board action;
- (5) requesting parties to file original documents with the hearing clerk;
- (6) establishing the deadlines for filing documents with the hearing clerk;
- (7) requesting the prevailing party to submit a proposed statement of reasons in support of the board's decision; and
- (8) filing with the hearing clerk all original documents issued by the hearing officer.

C. Notice of hearing officer assignment: If a hearing officer other than a board member is assigned as a hearing officer, the hearing clerk shall notify the parties of the name and address of the hearing officer. At the same time, the hearing clerk also shall forward to the hearing officer copies of all documents related to the petition that have been filed to date.

[20.11.82.11 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.12 LIBERAL CONSTRUCTION: 20.11.82 NMAC shall be liberally construed to carry out its objectives.
[20.11.82.12 NMAC - N, 8/11/08]

20.11.82.13 GENERAL PROVISIONS - COMPUTATION OF TIME:

A. Computation of time: In computing any period of time prescribed or allowed by 20.11.82 NMAC, except as otherwise specifically provided, the day of the event from which the designated period begins to run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday, or legal city of Albuquerque holiday, in which event the time shall be extended until the end of the next day that is not a Saturday, Sunday or legal city of Albuquerque holiday. Whenever a party must act within a prescribed period after service upon a party, and service is by mail, three days shall be added to the prescribed period. The three-day extension does not apply to any deadline imposed by the act.

B. Extension of time: For good cause shown, and after consideration of prejudice to other parties, the board or hearing officer may grant an extension of time for filing any document upon timely motion of a party to the proceeding.

[20.11.82.13 NMAC - N, 8/11/08]

20.11.82.14 GENERAL PROVISIONS - RECUSAL:

A. No board member shall participate in any action in which that member's impartiality or fairness may reasonably be questioned. The member shall recuse oneself in any such action by giving notice to the board and the general public by announcing the recusal on the record. In making a decision to recuse oneself, the board member may rely upon any relevant authority.

B. A board member or a hearing officer shall not perform any function authorized by 20.11.82 NMAC regarding any matter in which a board member or a hearing officer:

- (1) has a personal bias or prejudice concerning a party;
- (2) is related to a party within the third degree of relationship;
- (3) is an officer, director or trustee of a party or interested participant in the proceeding; or
- (4) has a financial interest in the proceeding or has any other conflict of interest.

[20.11.82.14 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.15 GENERAL PROVISIONS - EX PARTE COMMUNICATION: At no time after a proceeding is initiated by filing a petition pursuant to 20.11.82.18 NMAC and before the conclusion of a proceeding initiated pursuant to 20.11.82 NMAC shall any person have ex parte contact with a board member or the hearing officer regarding the merits of a petition or motion filed pursuant to 20.11.82 NMAC.

[20.11.82.15 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.16 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:

A. The filing of any document as required by 20.11.82 NMAC shall be accomplished by delivering the document to the hearing clerk.

B. Any person filing any document shall:

- (1) provide the hearing clerk with the original and 15 copies of the document;
- (2) deliver a copy to the board attorney;
- (3) serve a copy on all other parties; and
- (4) file with the hearing clerk at least 15 days before any hearing or meeting at which the board will

consider the document; if the document is a motion seeking an order from the hearing officer in a rulemaking hearing, the motion shall also be served at the same time on the hearing officer and the board attorney; motions and responses shall be filed only by parties to a hearing and shall comply with 20.11.82.16 NMAC and 20.11.82.25 NMAC;

- (5) if the document is a motion for a stay, 20.11.82.35 NMAC shall apply.

C. Whenever 20.11.82 NMAC requires service of a document, service on all other parties shall be made by delivering a copy to the person to be served by hand delivery, mail or, if that person has agreed in writing, by sending it by facsimile or by electronic transmission to that person. An agreement to be served by facsimile or electronic transmission may be evidenced by placing the person's facsimile number or email address on a document filed pursuant to 20.11.82 NMAC. Service shall also be made upon the board's attorney. If a person is represented by an attorney, service of the document shall be made on the attorney. Service by mail is complete upon mailing the document unless service is made by mail to a party who must act within a prescribed period after being served, in which case three days shall be added to the prescribed period. The three-day extension does not apply to any deadline imposed by the act. Service by facsimile or electronic transmission is accomplished when the transmission of the document is completed. The person who received the facsimile or electronic transmission shall promptly provide written confirmation of receipt if requested by the hearing officer, the board or a party.

D. The petitioner and any person who has filed a timely NOI pursuant to 20.11.82.20 NMAC may inspect all documents that have been filed in a proceeding in which that person is involved as a participant. The inspection shall be permitted as provided by the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12. Whenever any document is filed in a proceeding subject to 20.11.82 NMAC, the hearing clerk shall notify by email the petitioner and all persons who have filed a timely NOI. A person who does not provide an email address shall instead be notified by mail.

E. The hearing clerk shall provide copies of all documents to each board member at least five days before a hearing or meeting at which the board will consider the documents. The hearing officer may make an exception to this requirement.

F. 20.11.82.20 NMAC and 20.11.82.28 NMAC also provide requirements regarding hearing exhibits.
[20.11.82.16 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.17 EXAMINATION OF DOCUMENTS FILED:

A. **Examination allowed:** Any person may inspect and request a copy of any document filed in any rulemaking proceeding before the board, during normal business hours, subject to the provisions of law restricting the public disclosure of confidential information. The documents shall be made available by the hearing clerk as required by the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12, and may be viewed at the Albuquerque environmental health department, 400 Marquette NW, Suite 3023, Albuquerque, NM 87102.

B. **Cost of duplication:** The cost of duplicating documents shall be borne by the person seeking copies of the documents.

[20.11.82.17 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.18 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE:

A. Any person may file a petition with the board to adopt, amend or repeal any regulation within the jurisdiction of the board.

B. The petition shall be in writing and shall include the name of the regulation and a statement of the reasons for the proposed regulatory change. The petition shall cite the relevant statutes that authorize the board to adopt the proposed regulatory change, and shall estimate the time that will be needed to conduct the rulemaking hearing, if at all possible. A copy of the entire rule, including any proposed regulatory change, indicating any language proposed to be added or deleted, shall be attached to the petition. The entire rule and its proposed changes shall be submitted to the board in legislative-edit format, with strike-outs and underlines as appropriate, and shall include individual line numbers. The hearing clerk shall return to the petitioner any document that does not meet the requirements of 20.11.82.18 NMAC, along with a copy of 20.11.82 NMAC and a check-list of required items. The petitioner will be asked to resubmit the petition as required by 20.11.82.18 NMAC.

C. At a public meeting occurring no later than 60 days after receipt of the petition, the board shall determine whether or not to hold a public hearing on the proposed regulatory change. Any person may respond to the petition either in writing before the public meeting or in person at the public meeting.

D. If the board decides by a vote of a majority of board members present to hold a public hearing on the petition, the board may issue orders specifying procedures for conduct of the hearing, in addition to the requirements established in 20.11.82 NMAC, as may be necessary and appropriate to fully inform the board of the matters at issue in the hearing or control the conduct of the hearing. The orders may include requirements for giving additional public notice, holding pre-hearing conferences, filing direct testimony in writing before the hearing, or limiting testimony or cross-examination.

[20.11.82.18 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.19 NOTICE OF HEARINGS:

A. Unless otherwise allowed by governing law and specified by the board, the board, through the hearing clerk, shall give public notice of the hearing at least 30 days before the hearing unless the board requires a longer public notice period. Public notice shall include at a minimum:

- (1) a single publication in the newspaper with the largest general circulation in Bernalillo county;
- (2) publication in the New Mexico Register;
- (3) if technically feasible at the time, publication by electronic media; and
- (4) other means of providing notice as the board may direct or are required by law.

B. The board shall make reasonable efforts to give notice to persons who have made a written request to the board for advance notice of regulatory change hearings. Requests for notice shall be addressed to the hearing clerk, shall designate the areas of board activity that are of interest, and provide a legible address to which notice can be sent.

C. Public notice of the hearing shall state:

- (1) the subject, including a description of the proposed regulatory change, date, time and place of the hearing;
- (2) the statutes, regulations and procedural rules governing the conduct of the hearing;
- (3) the manner in which persons may present their views or evidence to the board;
- (4) the location where persons may obtain copies of the proposed regulatory change; and
- (5) if applicable, that the board may make a decision on the proposed regulatory change at the

conclusion of the hearing or at a separate board meeting.

[20.11.82.19 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.20 TECHNICAL TESTIMONY; NOTICE OF INTENT (NOI):

A. No later than 15 days before the hearing, any person, including the petitioner, who intends to present technical testimony at the hearing shall file an NOI. The NOI shall:

- (1) identify the person for whom the witness or witnesses will testify;
- (2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background;
- (3) include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
- (4) include the text of any recommended modifications to the proposed regulatory change;
- (5) list and attach an original and 15 copies of all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and
- (6) be served on the petitioner, if the document is an NOI filed by any person other than the petitioner.

B. The person filing an NOI shall serve the notice pursuant to 20.11.82.16 NMAC.

C. The hearing officer may enforce the provisions of 20.11.82.20 NMAC by taking whatever action the hearing officer deems appropriate, including exclusion of the technical testimony of any witness for whom an NOI was not timely filed. If the testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to the testimony.

[20.11.82.20 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.21 ENTRY OF APPEARANCE: Any person who is or may be affected by the proposed regulatory change may file an entry of appearance and shall be a party. The entry of appearance shall be filed no later than 15 days before the date of the hearing on the petition. In the event of multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the entries, or divide the service list to avoid a waste of public resources.

[20.11.82.21 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.22 NON-TECHNICAL TESTIMONY; PARTICIPATION BY GENERAL PUBLIC:

A. Any member of the general public may provide non-technical testimony at the hearing. Notification before the hearing is not required in order to present non-technical testimony at the hearing. A person providing non-technical testimony may also offer non-technical exhibits in connection with the testimony provided, if the exhibit is not an undue repetition of previous non-technical testimony. Members of the general public are requested to deliver an original and 15 copies of each non-technical exhibit offered, to the hearing clerk, either before or at the hearing.

B. A member of the general public who wishes to submit a non-technical written statement for the record instead of providing oral testimony at the hearing shall file the written statement before the hearing or submit it at the hearing, and is requested to provide an original and 15 copies of the statement to the hearing clerk.

C. A member of the general public who wishes to provide technical testimony or offer technical exhibits shall comply with requirements of 20.11.82.20 NMAC.

[20.11.82.22 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.23 LOCATION OF HEARING: Unless otherwise provided by governing law, the board shall hold rulemaking hearings and meetings in public facilities within Bernalillo county with public seating available.

[20.11.82.23 NMAC - N, 8/11/08]

20.11.82.24 PARTICIPATION AT A BOARD MEETING BY CONFERENCE TELEPHONE OR OTHER SIMILAR DEVICE: A member of the board may participate in a meeting of the board by means of a conference telephone or other similar communications equipment when a medical or emergency situation exists that makes it extremely difficult or impossible for the member to attend the meeting in person, provided that each member participating by conference telephone or other device can be identified when speaking, all participants are able to hear each other at the same time, and members of the public attending the meeting are able to hear any member of the board who speaks at the meeting. A request to be present and vote by telephone or other similar device shall be made by the member to the chair or acting chair of the board. A board member who wishes to participate in a meeting in this manner must receive permission from the chair or acting chair of the board sufficiently in advance of the meeting so the hearing clerk can make adequate arrangements. The chair or acting

chair shall determine whether a qualifying medical or emergency situation exists. The chair or acting chair who approves the request shall direct the hearing clerk to make arrangements. A board member's participation by such means shall constitute presence in person at the meeting. This provision shall not be used to allow a member to constitute a quorum of the board, and may only be used for the purposes of:

- A. choosing a hearing officer;
- B. authorizing the hearing clerk to secure a hearing officer for a hearing or hearings;
- C. scheduling or rescheduling a meeting or hearing; and
- D. voting on the limited issues listed in Subsections A, B and C of 20.11.82.24 NMAC.

[20.11.82.24 NMAC - N, 8/11/08; A, 10/15/12]

20.11.82.25 MOTIONS:

A. **General:** All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, and state the relief sought. Each written motion shall be accompanied by an affidavit, certificate or other evidence relied upon, and shall be filed and served as required by 20.11.82.16 NMAC.

B. **Unopposed motions:** All unopposed motions shall state that the concurrence or agreement of all other parties was obtained. The party that filed the motion shall submit to the hearing officer for review a proposed order that has been approved by all parties.

C. **Opposed motions:** All opposed motions shall state either that concurrence or agreement of all other parties was sought and denied, or why concurrence was not sought. A memorandum brief in support of an opposed motion may be filed with the motion.

D. **Response to motions:** a party upon whom an opposed motion is served shall have 15 days after service of the motion to file a response. Any other party who fails to file a timely response shall be deemed to have waived any objection to the granting of the motion.

E. **Reply to response:** The moving party may submit, but is not required to submit a reply to any response within 10 days after service of the response.

F. **Decision regarding motions:** Motions may be decided by the hearing officer, in the hearing officer's sole discretion, without a hearing. Within five days after being served with a copy of the motion, a party upon whom service has been made may file a written request asking that a hearing be held. A procedural motion may be ruled upon before the expiration of the time for response. Any response regarding a procedural motion received after the decision is made shall be treated as a request for reconsideration of the ruling. However, the hearing officer shall refer all motions that would effectively dispose of the petition to the board for a decision.
[20.11.82.25 NMAC - N, 8/11/08; 20.11.82.25 NMAC - N, 10/15/12]

20.11.82.26 HEARING PROCEDURES - CONDUCT OF HEARINGS:

A. The rules of civil procedure and the rules of evidence shall not apply.

B. The hearing officer shall conduct the hearing in a manner that provides a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome, or burdening the record with unnecessary repetition. The hearing shall proceed as follows.

(1) The hearing shall begin with a statement from the hearing officer. The statement shall identify the nature and subject matter of the hearing and explain the procedures to be followed.

(2) The hearing officer may allow a brief opening statement by any party who wishes to make one.

(3) Unless otherwise ordered, the petitioner shall present its case first.

(4) The hearing officer shall establish an order for the testimony of other participants. The order may be based upon NOI(s), sign-in sheets and the availability of witnesses who cannot be present for the entire hearing.

(5) If the hearing continues for more than one day, the hearing officer shall provide an opportunity each day for testimony from members of the general public. Members of the general public who wish to present testimony should indicate their intent to testify on a sign-in sheet.

(6) The hearing officer may allow a brief closing argument by any party who wishes to make one.

(7) At the close of the hearing, the hearing officer shall determine whether to keep the record open for written submittals in accordance 20.11.82.30 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject or subjects regarding which submittals will be allowed and the deadline for filing the submittals.

(8) Any board action to adopt, amend or repeal a board regulation requires the concurrence of four board members.

[20.11.82.26 NMAC - N, 8/11/08; 20.11.82.26 NMAC - Rn & A, 20.11.82.25 NMAC, 10/15/12]

20.11.82.27 TESTIMONY AND CROSS-EXAMINATION:

A. All testimony shall be taken under oath or affirmation, which may be accomplished as a group or individually.

B. The hearing officer shall admit all relevant evidence, unless the hearing officer determines that the evidence is incompetent or unduly repetitious. The hearing officer shall require all oral testimony be limited to the position of the witness in favor of, or against the proposed rule.

C. Any person who testifies at the hearing is subject to cross-examination on the subject matter of that person's direct testimony and matters affecting that person's credibility. Any person attending the hearing is entitled to conduct cross-examination as may be required for a full and true disclosure of matters at issue in the hearing. The hearing officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.

[20.11.82.27 NMAC - N, 8/11/08; 20.11.82.27 NMAC - Rn & A, 20.11.82.26 NMAC, 10/15/12]

20.11.82.28 TECHNICAL EXHIBITS:

A. The deadlines for filing technical exhibits are established by 20.11.82.20 NMAC.

B. Any party offering a technical exhibit shall provide the hearing clerk with an original and 15 copies for the board, the hearing officer, the board attorney, and persons attending the hearing.

C. All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially. If a person offers multiple exhibits, the person shall identify each exhibit with an index tab or by other appropriate means.

D. Large charts and diagrams, models and other bulky exhibits are discouraged. If visual aids are used, legible copies shall be submitted for inclusion in the record.

[20.11.82.28 NMAC - N, 8/11/08; 20.11.82.28 NMAC - Rn & A, 20.11.82.27 NMAC, 10/15/12]

20.11.82.29 TRANSCRIPT OF PROCEEDINGS: The hearing clerk shall arrange for a court reporter to make a verbatim transcription of the hearing unless the board requires another method of recording. The petitioner shall pay the cost of the court reporter and the original transcription. The petitioner shall also pay the cost of a copy of a transcription for each board member, the hearing officer and the board attorney if required by the hearing officer or the board.

[20.11.82.29 NMAC - N, 8/11/08; 20.11.82.29 NMAC - Rn, 20.11.82.28 NMAC, 10/15/12]

20.11.82.30 POST-HEARING SUBMISSIONS: The hearing officer may allow the record to remain open for a reasonable period of time following the conclusion of the hearing for written submission of additional evidence, comments and arguments, and proposed statements of reasons. The hearing officer's determination regarding post-hearing submissions shall be announced at the conclusion of the hearing. In considering whether the record will remain open, the hearing officer shall consider the reasons why the material was not presented during the hearing, the significance of the material to be submitted and the necessity for a prompt decision.

[20.11.82.30 NMAC - N, 8/11/08; 20.11.82.30 NMAC - Rn & A, 20.11.82.29 NMAC, 10/15/12]

20.11.82.31 HEARING OFFICER'S REPORT: If the board directs, the hearing officer shall file a report of the hearing. The report shall identify the issues addressed at the hearing, identify the parties' final proposals and the evidence supporting those proposals, including discussion or recommendations as requested by the board, and shall be filed with the hearing clerk within the time specified by the board. The hearing clerk shall promptly notify each party that the hearing officer's report has been filed and shall provide each party with a copy of the report and notice of any deadline set for comments on the report.

[20.11.82.31 NMAC - N, 8/11/08; 20.11.82.31 NMAC - Rn & A, 20.11.82.30 NMAC, 10/15/12]

20.11.82.32 DELIBERATION AND DECISION:

A. As provided in the act at NMSA 74-2-5.E, in making its regulations, the board shall give weight it deems appropriate to all facts and circumstances, including:

- (1) character and degree of injury to or interference with health, welfare, visibility and property;
- (2) the public interest, including the social and economic value of the sources and subjects of air contaminants, with due consideration for environmental justice principles; and
- (3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

B. If a quorum of the board attended the hearing, and if the hearing notice indicated that a decision might be made at the conclusion of the hearing or meeting, the board may immediately deliberate and make a decision on the proposed regulatory change at the end of the hearing or at a board meeting after the hearing.

C. If the board does not reach a decision at the conclusion of the hearing or meeting, then, following receipt of the transcript, the hearing clerk shall promptly furnish a copy of the transcript to each board member who did not attend the hearing and, if necessary, to other board members, the board attorney and the hearing officer. Exhibits that were provided to persons at the time of the hearing need not be supplied again.

D. The board shall reach its decision on the proposed regulatory change within 60 days after the later of the close of the record or the date the hearing officer's report is filed, if a quorum of the board is available.

E. During the course of its deliberations, if the board determines that additional testimony or documentary evidence is necessary for a proper decision on the proposed regulatory change, then, consistent with the requirements of due process, the board may reopen the hearing for necessary additional evidence only. The board or hearing officer may require additional notice as appropriate.

F. The board shall issue its decision on the proposed regulatory change in a suitable format, which shall include its reasons for the action taken.

G. The board's written decision is the official version of the board's action and the reasons for that action. Other written or oral statements by board members are not a part of the board's official decision or reasons. [20.11.82.32 NMAC - N, 8/11/08; 20.11.82.32 NMAC - Rn & A, 20.11.82.31 NMAC, 10/15/12]

20.11.82.33 NOTICE OF BOARD ACTION: The hearing clerk shall provide notice of the board's action to each of the parties who have provided a legible address and to all other persons who have made a written request to the board for notification of the action taken, and have provided a legible address.

[20.11.82.33 NMAC - N, 8/11/08; 20.11.82.33 NMAC - Rn & A, 20.11.82.32 NMAC, 10/15/12]

20.11.82.34 APPEAL OF BOARD REGULATIONS:

A. Appeal of any regulatory change by the board shall be taken in accordance with NMSA 74-2-9.

B. The appellant shall serve a copy of the notice of appeal on the board and on each party.

C. The appellant shall be responsible for preparation of a sufficient number of copies of the record proper at the expense of appellant.

D. Unless otherwise provided by NMSA 74-2-9, the filing of an appeal shall not act as a stay of the regulatory change being appealed.

[20.11.82.34 NMAC - N, 8/11/08; 20.11.82.34 NMAC - Rn & A, 20.11.82.33 NMAC, 10/15/12]

20.11.82.35 STAY OF BOARD REGULATIONS:

A. Any person who is or may be affected by a regulatory change adopted by the board may file a motion with the board seeking a stay of that rule or regulatory change. The motion shall include the reason for, and the legal authority supporting the granting of a stay. The movant shall serve the motion for a stay as provided by 20.11.82.16 NMAC. The movant shall file the motion at least 15 days before the next regularly scheduled board meeting. At the beginning of the next regularly scheduled board meeting, the board shall appoint a hearing officer. The hearing officer shall preside at the motion hearing, which shall occur before the meeting at which the board makes a final decision regarding the motion.

B. Unless otherwise provided by governing law, the board may grant a stay pending appeal of any regulatory change promulgated by the board. The board may only grant a stay if good cause is shown after a motion is filed and a hearing is held.

C. In determining whether good cause exists for granting a stay, the board shall consider:

- (1) the likelihood that the movant will prevail on the merits of the appeal;
- (2) whether the moving party will suffer irreparable harm if a stay is not granted;
- (3) whether substantial harm will result to another participant; and
- (4) whether harm to the public interest will result.

D. If no action is taken within 60 days after filing of the motion, the board shall be deemed to have denied the motion for stay.

[20.11.82.35 NMAC - Rn & A, 20.11.82.34 NMAC, 10/15/12]

HISTORY OF 20.11.82 NMAC: [RESERVED]

**STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF THE PETITION TO AMEND
20.11.49 NMAC, *EXCESS EMISSIONS***

AQCB Petition No. 2016-3

**Environmental Health Department,
City of Albuquerque, Petitioner.**

NOTICE OF HEARING OFFICER ASSIGNMENT

At its July 13, 2016 meeting, the Albuquerque-Bernalillo County Air Quality Control Board designated attorney Felicia Orth as hearing officer to conduct a hearing, in accordance with the procedures in 20.11.82 NMAC, on the Environmental Health Department's petition to amend 20.11.49 NMAC – *Excess Emissions* and request its removal from the State Implementation Plan.

Contact information for hearing officer Orth:

C/o Andrew Daffern, Environmental Health Department
P.O. Box 1293
Albuquerque, New Mexico 87103
Email: orthf@yahoo.com
Phone: (505) 695-8944

RECEIVED
ENVIRONMENTAL HEALTH
16 JUL 29 PM 4: 08

Respectfully submitted,



Andrew Daffern, Hearing Clerk
Air Quality Program
Environmental Health Department
P.O. Box 1293
One Civic Plaza NW, Room 3023
Albuquerque, New Mexico 87102

CERTIFICATE OF SERVICE

I hereby certify that I have e-mailed a true and correct copy of the foregoing NOTICE OF HEARING OFFICER ASSIGNMENT on this 29th day of July, 2016, to the following:

E-mailed
Felicia Orth
orthf@yahoo.com
Hearing Officer

E-mailed
Carol M. Parker, Assistant City Attorney,
Air Quality Program
cparker@cabq.gov
Counsel for Petitioner

Respectfully submitted,


Andrew Daffern, AQCB Hearing Clerk

NOTICE TO PERSONS WITH DISABILITIES: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.

RECEIVED
ENVIRONMENTAL HEALTH

STATE OF NEW MEXICO
ALBUQUERQUE/BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

16 AUG 18 PM 1:53

IN THE MATTER OF THE
PETITION TO AMEND
20.11.49 NMAC, *EXCESS EMISSIONS*

AQCB Petition No. 2016-3

Environmental Health Department,
City of Albuquerque, Petitioner

PREHEARING ORDER

EHD Counsel Carol Parker and EHD staff member Ed Merta participated in a teleconference with the Hearing Officer on July 19, 2016. No other party has entered an appearance. EHD Counsel requested a procedural order to guide certain steps relating to direct technical testimony in the upcoming rulemaking hearing in this matter on September 14, 2016.

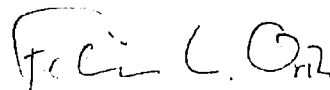
Air Board rulemaking hearings should be conducted in a manner that provides a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome, or burdening the record with unnecessary repetition. 20.11.82.26(B) NMAC.

To facilitate conduct of the hearing in regard to direct technical testimony filed with a notice of intent to present technical testimony (NOI), the Hearing Officer orders the following:

1. Pre-filing of a copy of the signed, direct testimony of a technical witness (Testimony) as an exhibit attached to an NOI shall suffice in place of the witness reading the Testimony at the hearing, provided that the technical witness testifies under oath to establish an evidentiary foundation that the Testimony that was attached to the NOI is an authentic copy of the Testimony

submitted by the witness and that it is true and correct. Testimony pre-filed as part of an NOI shall be presumed relevant unless an objection is timely raised and sustained by the Hearing Officer. The technical witness may then be cross-examined on any aspect of the written Testimony as though it had been given orally at the hearing.

2. Any corrections to pre-filed Testimony shall be explained at the hearing prior to a witness being cross-examined and shall be accompanied by a signed corrected version of the Testimony.

A handwritten signature in black ink, appearing to read "Felicia L. Orth". The signature is written in a cursive, flowing style.

Felicia L. Orth. Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have e-mailed a true and correct copy of the foregoing PREHEARING ORDER on this 18th day of August, 2016, to the following:

E-mailed

Felicia Orth

orthf@yahoo.com

Hearing Officer

E-mailed

Carol M. Parker, Assistant City Attorney,

Air Quality Program

cparker@cabq.gov

Counsel for Petitioner

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew Daffern', is written over a horizontal line.

Andrew Daffern, AQCB Hearing Clerk

NOTICE TO PERSONS WITH DISABILITIES: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.

**STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF THE PETITION TO AMEND
20.11.49 NMAC, *EXCESS EMISSIONS***

AQCB Petition No. 2016-3

**Environmental Health Department,
City of Albuquerque, Petitioner.**

AFFIDAVIT OF PUBLICATION AND NOTICE OF FILING

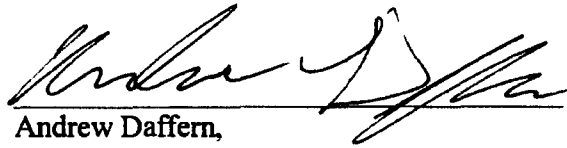
I, Andrew Daffern, Hearing Clerk for the Albuquerque – Bernalillo Air Quality Control Board (Air Board), certify that notice of the hearing in this matter was published on July 29, 2016 in the *Albuquerque Journal* (Exhibits 1 and 2) and the *New Mexico Register* (Exhibits 3 and 4). On the same day that the above notices were published, notice of hearing was distributed by email to the list serve of the Air Board (Exhibits 5, 6, and 7), which includes members of the public who have requested notification of rulemaking actions and other Air Board events. On the date the petition for regulatory change was filed, June 27, 2016, notice of the petition filing was distributed to the Air Board list serve (Exhibits 8, 9, and 10).

Please take notice that proof of notice for this hearing has been filed. The above Exhibits, 1 through 10, are attached to this document.

RECEIVED
ENVIRONMENTAL HEALTH
16 AUG 26 AM 9:20

At the time of filing, the affidavit of publication from the *Albuquerque Journal* was not yet available. It will be filed with the Air Board upon receipt.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew Daffern', written over a horizontal line.

Andrew Daffern,
Hearing Clerk
Air Quality Program
Environmental Health Department
P.O. Box 1293
One Civic Plaza NW, Room 3023
Albuquerque, New Mexico 87103

CERTIFICATE OF SERVICE

I hereby certify that I have e-mailed a true and correct copy of the foregoing
AFFIDAVIT OF PUBLICATION AND NOTICE OF FILING on this 26th day of August, 2016,
to the following:

E-mailed

Felicia Orth

orthf@yahoo.com

Attorney for Air Quality Control Board

E-mailed

Carol M. Parker, Assistant City Attorney,

Air Quality Program

cparker@cabq.gov

Counsel for Respondent

Respectfully submitted,



Andrew Daffern, AQCB Hearing Clerk

EXHIBIT LIST

- | | |
|-------------------|---|
| Exhibit 1 | Ad proof/order Confirmation for publication of hearing notice in Albuquerque Journal |
| Exhibit 2 | Legal notice of hearing, published in online edition of Albuquerque Journal, July 29, 2016 |
| Exhibit 3 | Invoice for publication of hearing notice in New Mexico Register |
| Exhibit 4 | Legal notice of hearing, published in New Mexico Register, July 29, 2016 |
| Exhibit 5 | Legal notice of hearing, distributed to Air Board list serve, July 29, 2016 |
| Exhibit 6 | Confirmation of email distribution of hearing notice to Air Board list serve |
| Exhibit 7 | List of email addresses of recipients of hearing notice sent to Air Board list serve |
| Exhibit 8 | Notice of petition filing, sent to Air Board list serve, June 27, 2016 |
| Exhibit 9 | Confirmation of email distribution of petition filing notice |
| Exhibit 10 | List of email addresses of recipients of petition filing notice |

Albuquerque Publishing Company
 7777 Jefferson N.E. Albuquerque, New Mexico 87109
 P.O. Drawer J-T Albuquerque, New Mexico 87103
 (505) 823-7777

Account Number

1007580

Ad Order Number

0001301893

Ad Proof/Order Confirmation

CITY OF ALB-ENVIRONMENTAL HEAL
 P O BOX 1293
 ALBUQUERQUE, NM 87103 USA

Ordered By EdCustomer Phone

5057682600

Joint Ad #Customer EMailPO Number

701374

Ad Cost \$136.71Sales Rep

eaustin

Tax Amount \$10.00Order Taker

cwhite

Total Amount \$146.71Payment Method

Credit Card

Amount Due \$146.71Payment Amount

\$0.00

Affidavits 0Pick Up #Product Albuquerque JournalPlacement

Legal Notices

Ad Number 0001301893-01Classification

Government

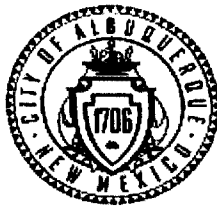
Ad Type APC-LegalsSort Text
 ALBUQUERQUEBERNALILLOCOUNTY
 AIRQUALITYCONTROLBOARDNOTIC
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 NOFPROPOSEDAMENDMENTSTO201
 149NMACEXCESSEMISSIONSONW
Ad Size 1 X 216 liColorRun Date

07/29/2016

07/29/2016

WYSIWYG Content

Exhibit 1



**ALBUQUERQUE-BERNALILLO
COUNTY AIR QUALITY
CONTROL BOARD
NOTICE OF HEARING
TO CONSIDER ADOPTION OF
PROPOSED AMENDMENTS
TO 20.11.49 NMAC, EXCESS
EMISSIONS**

On Wednesday, September 14, 2016, at 5:30 PM, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The hearing will address a petition for regulatory change from the City of Albuquerque, Environmental Health Department (EHD), proposing to adopt amendments to 20.11.49 NMAC, Excess Emissions and request that the U.S. Environmental Protection Agency (EPA) withdraw that regulation in its entirety from the Albuquerque - Bernalillo County portion of the New Mexico State Implementation Plan (SIP) for air quality.

Following the hearing, the Air Board at its regular monthly meeting the same evening is expected to consider adopting the amendments. The agenda for the regular monthly meeting will be viewable at least 72 hours in advance of the meeting at <http://www.cabq.gov/airquality/air-quality-control-board/events/september-14-2016-air-quality-control-board-meeting>.

On May 22, 2015, the EPA finalized an action requiring 36 states to remove SIP provisions on affirmative defenses for excess emissions during startup, shutdown, and malfunction of a facility. EPA has determined that such affirmative defense provisions, including those now in effect in Albuquerque and Bernalillo County, are substantially inadequate to meet the requirements of the federal Clean Air Act.

The City of Albuquerque Environmental Health Department, Air Quality Program, plans to comply with this federal requirement by proposing an amended version of 20.11.49 NMAC, Excess Emissions.

The Public Review Draft of the amended 20.11.49 NMAC may be reviewed during regular business hours at the Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, NM 87102. Copies of the Public Review Draft may be obtained by contacting Andrew Daffern, Air Quality Control Board Liaison, at (505) 768-2601 or adaffern@cabq.gov. The Public Review Draft and EHD's petition for regulatory change can also be found on the web site of EHD, Air Quality Program, at: <http://www.cabq.gov/airquality/air-quality-control-board/documents/ehds-petition-to-amend-20-11-49-nmac-excess-emissions-and-request-its-removal-from-the-state-implementation-plan.pdf>.

If the Air Board adopts the amendments, EHD asks that the Air Board authorize a request to EPA.

Use a summary of request to LHM to remove the entire 20.11.49 NMAC from the SIP.

The hearing on the proposed regulatory change will be conducted in accordance with NMSA 1978 § 74-2-6; City of Albuquerque Joint Air Quality Control Board Ordinance, RQA § 9-5-1-6, Adoption of Regulations, Notice and Hearing; Bernalillo County Ordinance, Section 30-35, Adoption of Regulations, Notice and Hearings; and 20.11.82 NMAC, Rulemaking Procedures—Air Quality Control Board.

All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Interested persons may present technical or non-technical testimony.

Persons wishing to present technical testimony must file with the hearing clerk a written notice of intent (NOI) to do so by 5:00 p.m. on Tuesday, August 30, 2016. The contact information for the hearing clerk is: Andrew Dallern, Air Quality Control Board Liaison, Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, New Mexico 87102.

As required by 20.11.82.20 NMAC, the NOI shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
- (4) include the text of any recommended modifications to the proposed regulatory change;
- (5) list and attach an original and 15 copies of all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and
- (6) be served on the petitioner, if the document is an NOI filed by any person other than the petitioner.

An NOI must also follow the filing and service requirements of 20.11.82.16 NMAC.

As provided by 20.11.82.22 NMAC, any member of the general public may present non-technical testimony at the hearing. No prior notification is required to present non-technical testimony. Any member of the public may also offer exhibits in connection with non-technical testimony, as long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a non-technical written statement for the record in lieu of oral testimony shall file the written statement prior to the hearing, or submit it at the hearing. Written statements submitted prior to the hearing may be directed to the hearing clerk, Andrew Dallern, at the above contact information.

NOTICE FOR PERSON WITH DISABILITIES OR SPECIAL NEEDS: If you have a disability or require special assistance to participate, including translation/interpretation service, or review of any agendas, minutes, or other public meeting documents, please contact Andrew Dallern, hearing clerk, by 5:00 p.m. on Tuesday, August 30, 2016, at (505) 768-2971 or adallern@rahn.nm.gov TTY

users requiring special assistance
may call the New Mexico Relay at
1-800-659-8331.
Journal: July 28, 2016



Published in the Albuquerque Journal on Friday July 29, 2016

ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD NOTICE OF HEARING TO CONSIDER ADOPTION OF PROPOSED AMENDMENTS TO 20.11.49 NMAC, EXCESS EMISSIONS On Wednesday, September 14, 2016, at 5:30 PM, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The hearing will address a petition for regulatory change from the City of Albuquerque, Environmental Health Department (EHD), proposing to adopt amendments to 20.11.49 NMAC, Excess Emissions and request that the U.S. Environmental Protection Agency (EPA) withdraw that regulation in its entirety from the Albuquerque Bernalillo County portion of the New Mexico State Implementation Plan (SIP) for air quality. Following the hearing, the Air Board at its regular monthly meeting the same evening is expected to consider adopting the amendments. The agenda for the regular monthly meeting will be viewable at least 72 hours in advance of the meeting at <http://www.cabq.gov/airquality/air-quality-control-board/events/september-14-2016-air-quality-control-board-meeting>. On May 22, 2015, the EPA finalized an action requiring 36 states to remove SIP provisions on affirmative defenses for excess emissions during startup, shutdown, and malfunction of a facility. EPA has determined that such affirmative defense provisions, including those now in effect in Albuquerque and Bernalillo County, are substantially inadequate to meet the requirements of the federal Clean Air Act. The City of Albuquerque Environmental Health Department, Air Quality Program, plans to comply with this federal requirement by proposing an amended version of 20.11.49 NMAC, Excess Emissions. The Public Review Draft of the amended 20.11.49 NMAC may be reviewed during regular business hours at the Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, NM 87102. Copies of the Public Review Draft may be obtained by contacting Andrew Daffern, Air Quality Control Board Liaison, at (505) 768-2601 or adaffern@cabq.gov. The Public Review Draft and EHD's petition for regulatory change can also be found on the web site of EHD, Air Quality Program, at: <http://www.cabq.gov/airquality/air-quality-control-board/documents/ehds-petition-to-amend-20-11-49-nmac-excess-emissions-and-request-its-removal-from-the-state-implementation-plan.pdf>. If the Air Board adopts the amendments, EHD asks that the Air Board authorize a request to EPA to remove the entire 20.11.49 NMAC from the SIP. The hearing on the proposed regulatory change will be conducted in accordance with NMSA 1978 74-2-6; City of Albuquerque Joint Air Quality Control Board Ordinance, ROA 9-5-1-6, Adoption of Regulations, Notice and Hearing; Bernalillo County Ordinance, Section 30-35, Adoption of Regulations, Notice and Hearings; and 20.11.82 NMAC, Rulemaking Procedures Air Quality Control Board. All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Interested persons may present technical or non-technical testimony. Persons wishing to present technical testimony must file with the hearing clerk a written notice of intent (NOI) to do so by 5:00 p.m. on Tuesday, August 30, 2016. The contact information for the hearing clerk is: Andrew Daffern, Air Quality Control Board Liaison, Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, New Mexico 87102. As required by 20.11.82.20 NMAC, the NOI shall: (1) identify the person for whom the witness(es) will testify; (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background; (3) include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness; (4) include the text of any recommended modifications to the proposed regulatory change; (5) list and attach an original and 15 copies of all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and (6) be served on the petitioner, if the document is an NOI filed by any person other than the petitioner. An NOI must also follow the filing and service requirements of 20.11.82.16 NMAC. As provided by 20.11.82.22 NMAC, any member of the general public may present non-technical testimony at the hearing. No prior notification is required to present non-

technical testimony. Any member of the public may also offer exhibits in connection with non-technical testimony, as long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a non-technical written statement for the record in lieu of oral testimony shall file the written statement prior to the hearing, or submit it at the hearing. Written statements submitted prior to the hearing may be directed to the hearing clerk, Andrew Daffern, at the above contact information. **NOTICE FOR PERSON WITH DISABILITIES OR SPECIAL NEEDS:** If you have a disability or require special assistance to participate, including translation/interpretation service, or review of any agendas, minutes, or other public meeting documents, please contact Andrew Daffern, hearing clerk, by 5:00 p.m. on Tuesday, August 30, 2016, at (505) 768-2601, or adaffern@cabq.gov. TTY users requiring special assistance may call the New Mexico Relay at 1-800-659-8331. Journal: July 29, 2016

NM Commission of Public Records
1205 Camino Carlos Rey
Santa Fe 87507 US
(505) 476-7913

Invoice

Ed Merta
Albuquerque-Bernalillo Air Quality
Control Board
PO Box 1293
Albuquerque, NM 87103

ISSUE	PUBLICATION	P.O. NUMBER
1770	07/29/2016	\$77.50
	07/29/2016	

ISSUE	PUBLICATION	P.O. NUMBER
14	7/29/2016	335395

DATE	DESCRIPTION	QTY	RATE	AMOUNT
07/29/2016	N.M. Register - 431902 - Columnar Inch - Vol. XXVII, Notice Notice of Hearing to Consider Adoption of Proposed Amendments to 20.11.49 NMAC, Excess Emissions on 9/14/2016.	31	2.50	77.50

I, Matt Ortiz, certify that the agency noted above has published legal
notices or rules in the NEW MEXICO REGISTER, VOL. XXVI, and that
payment has been assessed for said legal notice or publication, which
appears on the publication date and issue number noted above.

BALANCE DUE

\$77.50

Affiant: Matt Ortiz
Publisher New Mexico Register

Subscribed, sworn and acknowledged before me this 29 day of
July, 2016.

Notary Public
My Commission Expires: May 5, 2019



OFFICIAL SEAL
Armanda N. Lopez
NOTARY PUBLIC-STATE OF NEW MEXICO
My commission expires: 5/5/2019

Notices of Rulemaking and Proposed Rules

ALBUQUERQUE- BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

Notice of Hearing to Consider Adoption of Proposed Amendments to 20.11.49 NMAC, Excess Emissions

On Wednesday, September 14, 2016, at 5:30 PM, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The hearing will address a petition for regulatory change from the City of Albuquerque, Environmental Health Department (EHD), proposing to adopt amendments to 20.11.49 NMAC, *Excess Emissions* and request that the U.S. Environmental Protection Agency (EPA) withdraw that regulation in its entirety from the Albuquerque-Bernalillo County portion of the New Mexico State Implementation Plan (SIP) for air quality.

Following the hearing, the Air Board at its regular monthly meeting the same evening is expected to consider adopting the amendments. The agenda for the regular monthly meeting will be viewable at least 72 hours in advance of the meeting at <http://www.cabq.gov/airquality/air-quality-control-board/events/september-14-2016-air-quality-control-board-meeting>.

On May 22, 2015, the EPA finalized an action requiring 36 states to remove SIP provisions on affirmative defenses for excess emissions during startup, shutdown, and malfunction of a facility. EPA has determined that such affirmative defense provisions, including those now in effect in Albuquerque and Bernalillo County, are substantially inadequate to meet

the requirements of the federal Clean Air Act.

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The Public Review Draft of the amended 20.11.49 NMAC may be reviewed during regular business hours at the Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, NM 87102. Copies of the Public Review Draft may be obtained by contacting Andrew Daffern, Air Quality Control Board Liaison, at (505) 768-2601 or adaffern@cabq.gov. The Public Review Draft and EHD's petition for regulatory change can also be found on the web site of EHD, Air Quality Program, at: <http://www.cabq.gov/airquality/air-quality-control-board/documents/ehds-petition-to-amend-20-11-49-nmac-excess-emissions-and-request-its-removal-from-the-state-implementation-plan.pdf>.

If the Air Board adopts the amendments, EHD asks that the Air Board authorize a request to EPA to remove the entire 20.11.49 NMAC from the SIP.

The hearing on the proposed regulatory change will be conducted in accordance with NMSA 1978 § 74-2-6; City of Albuquerque Joint Air Quality Control Board Ordinance, ROA § 9-5-1-6, *Adoption of Regulations, Notice and Hearing*; Bernalillo County Ordinance, Section 30-35, *Adoption of Regulations, Notice and Hearings*; and 20.11.82 NMAC, *Rulemaking Procedures-Air Quality Control Board*.

All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Interested

persons may present technical or non-technical testimony.

Persons wishing to present technical testimony must file with the hearing clerk a written notice of intent (NOI) to do so by 5:00 p.m. on Tuesday, August 30, 2016. The contact information for the hearing clerk is: Andrew Daffern, Air Quality Control Board Liaison, Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, New Mexico 87102.

As required by 20.11.82.20 NMAC, the NOI shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
- (4) include the text of any recommended modifications to the proposed regulatory change;
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- (6) be served on the petitioner, if the document is an NOI filed by any person other than the petitioner.

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FINANCE AND ADMINISTRATION, DEPARTMENT OF

Notice of Proposed Rule Making

The New Mexico Community Development Council (Council) through the Department of Finance and Administration gives notice that the Council will conduct a public hearing at Room 317 of the New Mexico State Capitol, 411 State Capitol, Santa Fe, New Mexico on Wednesday, October 19, 2016, at 10:00 a.m. The purpose of the public hearing will be to obtain input to the proposed amendments to 2.110.2 NMAC Small Cities Community Development Block Grant.

Interested individuals are encouraged to submit comments during the Public Comment Period from August 1, 2016 through August 31, 2016. Interested individuals may submit written comments to Jolene Slown, Bureau Chief, Community Development Bureau, Local Government Division, Department of Finance and Administration, via email at JoleneM.Slowen@state.nm.us, fax

(505)827-4948, or directed to Ms. Slown at Department of Finance and Administration, Local Government Division, Bataan Memorial Building Room 202, Santa Fe, New Mexico 87501.

Copies of the proposed rules may be accessed on the Department's website <http://www.nmdfa.state.nm.us/>, or obtained from Ms. Slown by calling (505) 827-4974.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to submit comment are asked to contact Ms. Slown as soon as possible. The Department of Finance and Administration requires at least ten (10) days advance notice to provide requested special accommodations.

GENERAL SERVICES DEPARTMENT

Notice of Proposed Rulemaking

The New Mexico General Services Department, State Purchasing Division, ("GSD" or "Department") hereby gives notice that the Department will conduct a public hearing as indicated to obtain input on the repealing of the current rule and replacing it with the following rule:

1.4.1.94 NMAC "CHIEF PROCUREMENT OFFICER REGISTRATION AND CERTIFICATION"

The proposed rules have been published and are also posted for public view on the State Purchasing Division website: <http://www.generalservices.state.nm.us/statepurchasing/>. A public hearing regarding the rules will be held on Thursday, September 15, 2016 in the ground floor Bid Room, Montoya Building, 1100 St. Francis Drive, Santa Fe, New Mexico 87505. The time for the hearing on the proposed rules is 3:30 P.M. MST.

Interested individuals may testify at the public hearing or submit written comments regarding the proposed rulemaking relating to 1.4.1.94 NMAC "CHIEF PROCUREMENT OFFICER REGISTRATION AND CERTIFICATION" to Mark Hayden, State Purchasing Division, Bureau Chief, New Mexico General Services Department, Room 2016, 1100 St. Francis Drive, Santa Fe, New Mexico 87505 or Mark.Hayden@state.nm.us, 505-827-2331, fax 505-827-2484. Written comments must be received no later than 5:00 PM on September 9, 2016.

The proposed rulemaking actions specific to the State Purchasing Division may be accessed on the Division's website <http://www.generalservices.state.nm.us/statepurchasing/> or obtained from Mark Hayden (contact information provided above).

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this hearing are asked to contact Mark Hayden as soon as possible. The Department requests at least seven days advanced notice (by close of business on September 9, 2016) for requests regarding special accommodations.

PUBLIC REGULATION COMMISSION

Notice of Proposed Rulemaking

CASE NO. 16-00003-UT

The Public Regulation Commission ("PRC" or "Commission") gives notice of its initiation of a proposed rulemaking promulgating revisions to Rule 17.11.23 NMAC concerning Retail Service Pricing Standards for Mid-Size Carriers.

Copies of the Order Initiating Rulemaking containing additional information, a copy of the proposed rule (which includes alternative

From: Albuquerque - Bernalillo County Air Quality Control Board
To: Merta, Ed L.
Subject: Notice of Hearing, 20.11.49 NMAC, Excess Emissions
Date: Friday, July 29, 2016 6:43:40 PM

**NOTICE OF HEARING TO
CONSIDER ADOPTION OF
PROPOSED AMENDMENTS TO
20.11.49 NMAC, *EXCESS
EMISSIONS***

On Wednesday, September 14, 2016, at 5:30 PM, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Griego Chambers located in the basement level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The hearing will address a petition for regulatory change from the City of Albuquerque, Environmental Health Department (EHD), proposing to adopt amendments to 20.11.49 NMAC, Excess Emissions and request that the U.S. Environmental Protection Agency (EPA) withdraw that regulation in its entirety from the Albuquerque - Bernalillo County portion of the New Mexico State Implementation Plan (SIP) for air quality.

Following the hearing, the Air Board at its regular monthly meeting the same evening is expected to consider adopting the amendments. The agenda for the regular monthly meeting will be viewable at least 72 hours in advance of the meeting at <http://www.cabq.gov/airquality/air-quality-control-board/events/september-14-2016-air-quality-control-board-meeting>.

On May 22, 2015, the EPA finalized an action requiring 36 states to remove SIP provisions on affirmative defenses for excess emissions during startup, shutdown, and malfunction of a facility. EPA has determined that such affirmative defense provisions, including those now in effect in Albuquerque and Bernalillo County, are substantially inadequate to meet the requirements of the federal Clean Air Act.

The City of Albuquerque Environmental Health Department,

Air Quality Program, plans to comply with this federal requirement by proposing an amended version of 20.11.49 NMAC, Excess Emissions.

The Public Review Draft of the amended 20.11.49 NMAC may be reviewed during regular business hours at the Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, NM 87102. Copies of the Public Review Draft may be obtained by contacting Andrew Daffern, Air Quality Control Board Liaison, at (505) 768-2601 or adaffern@cabq.gov. The Public Review Draft and EHD's petition for regulatory change can also be found on the web site of EHD, Air Quality Program, at:

<http://www.cabq.gov/airquality/air-quality-control-board/documents/ehds-petition-to-amend-20-11-49-nmac-excess-emissions-and-request-its-removal-from-the-state-implementation-plan.pdf>

If the Air Board adopts the amendments, EHD asks that the Air Board authorize a request to EPA to remove the entire 20.11.49 NMAC from the SIP.

The hearing on the proposed regulatory change will be conducted in accordance with NMSA 1978 § 74-2-6; City of Albuquerque Joint Air Quality Control Board Ordinance, ROA § 9-5-1-6, Adoption of Regulations, Notice and Hearing; Bernalillo County Ordinance, Section 30-35, Adoption of Regulations, Notice and Hearings; and 20.11.82 NMAC, Rulemaking Procedures-Air Quality Control Board.

All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Interested persons may present technical or non-technical testimony.

Persons wishing to present technical testimony must file with the hearing clerk a written notice of intent (NOI) to do so by 5:00 p.m. on Tuesday, August 30, 2016. The contact information for the hearing clerk is: Andrew Daffern, Air Quality Control Board Liaison, Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, New Mexico 87102.

As required by 20.11.82.20 NMAC, the NOI shall:

- (1) identify the person for whom the witness(es) will testify;
- (2) identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) include a copy of the direct testimony of each technical

witness and state the anticipated duration of the testimony of that witness;

- (4) include the text of any recommended modifications to the proposed regulatory change;
- (5) list and attach an original and 15 copies of all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and
- (6) be served on the petitioner, if the document is an NOI filed by any person other than the petitioner.

An NOI must also follow the filing and service requirements of 20.11.82.16 NMAC.

As provided by 20.11.82.22 NMAC, any member of the general public may present non-technical testimony at the hearing. No prior notification is required to present non-technical testimony. Any member of the public may also offer exhibits in connection with non-technical testimony, as long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a non-technical written statement for the record in lieu of oral testimony shall file the written statement prior to the hearing, or submit it at the hearing. Written statements submitted prior to the hearing may be directed to the hearing clerk, Andrew Daffern, at the above contact information.

NOTICE FOR PERSON WITH DISABILITIES OR SPECIAL NEEDS: If you have a disability or require special assistance to participate, including translation/interpretation service, or review of any agendas, minutes, or other public meeting documents, please contact Andrew Daffern, hearing clerk, by 5:00 p.m. on Tuesday, August 30, 2016, at (505) 768-2601, or adaffern@cabq.gov. TTY users requiring special assistance may call the New Mexico Relay at 1-800-659-8331.

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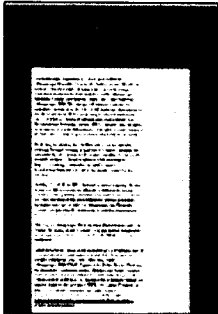
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Exhibit 6



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Date: Monday, June 27, 2016 3:10:40 PM

**Petition to amend 20.11.49 NMAC,
Excess Emissions, and request its
removal from the State
Implementation Plan**

Dear Stakeholder:

The City of Albuquerque Environmental Health
Department filed the above petition on June 27, 2016.

A copy of the petition with the public review draft of the
proposed amended regulation is available for download
at [https://www.cabq.gov/airquality/air-quality-control-
board/documents/ehds-petition-to-amend-20-11-49-nmac-
excess-emissions-and-request-its-removal-from-the-state-
implementation-plan.pdf](https://www.cabq.gov/airquality/air-quality-control-board/documents/ehds-petition-to-amend-20-11-49-nmac-excess-emissions-and-request-its-removal-from-the-state-implementation-plan.pdf).

The Environmental Health Department will request that
the petition be an item on the agenda at the scheduled
meeting of the Albuquerque - Bernalillo County Air Quality
Control Board on July 13, 2016.

Written comments regarding the proposed regulatory
change may be submitted to:

Ed Merta
Air Quality Regulation Development Coordinator
City of Albuquerque
Environmental Health Department
Air Quality Program
PO Box 1293
Albuquerque, NM 87103
Phone: (505) 768-2660
Fax: (505) 768-2617
emerta@cabq.gov

City of Albuquerque, One Civic Plaza NW, Albuquerque, NM 87102

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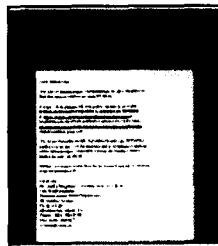
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NMAC, Excess Emissions

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Part 49 - petition

Exhibit 9

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Email Link	Unique Click-throughs	Click-through Distribution
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Total Click-throughs	18	100%

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**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF PETITION TO AMEND
20.11.49 NMAC – *EXCESS EMISSIONS***

AQCB Petition No.201

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**Environmental Health Department,
City of Albuquerque, Petitioner**

**ENVIRONMENTAL HEALTH DEPARTMENT'S
NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY**

The City of Albuquerque's Environmental Health Department (EHD), pursuant to 20.11.82.20 NMAC, submits this Notice of Intent to Present Technical Testimony in support of its petition to amend 20.11.49 NMAC – *Excess Emissions*.

1. Person for Whom Witnesses Will Testify

Witnesses will testify for EHD.

2. Name and Qualifications of Technical Witnesses

Mr. Dario Rocha and Mr. Damon Reyes will testify. Mr. Rocha's testimony is attached as Exhibit 1 and his resume is attached as Exhibit 2. Mr. Reyes' testimony is attached as Exhibit 3 and his resume is attached as Exhibit 4. The qualifications of Mr. Rocha and Mr. Reyes are summarized below.

Dario Rocha manages the Control Strategies Division of the Air Quality Program, and in this capacity, serves as Secretary to the Air Board, oversees coordination between the Air Board and EHD, manages regulatory development, including revisions to the State Implementation Plan, manages the Small Business Assistance Program, and serves as Air Quality Adviser for transportation planning to the Mid-Region Council of Governments. Prior to assuming his current position, Mr. Rocha served as Environmental Health Supervisor for EHD's Vehicle

Pollution Management Division, where he was responsible for quality assurance audits of emission testing facilities and inspectors, oversaw EHD staff conducting vehicle inspections, managed the enforcement program and supervised the collection and processing of emissions inventories for stationary and mobile sources from 2013 to 2015. From 2000 to 2013, Mr. Rocha worked for EHD's Air Quality Program as a permitting engineer. He began his EHD career as an Environmental Health Specialist in 2000, was promoted to an Environmental Health Scientist in 2003 and was promoted to an Environmental Health Supervisor in 2005, supervising and directing staff in the Permitting and Technical Analysis Section, until he moved to EHD's Vehicle Pollution Management Division in 2013. Before joining EHD's Air Quality Program in 2000, Mr. Rocha was a permit engineer for the New Mexico Environment Department's Air Quality Bureau from 1997 to 2000. He earned his B.S. in Mechanical Engineering from New Mexico State University.

Damon Reyes is the Environmental Health Manager, Enforcement and Compliance Division, Air Quality Program, Environmental Health Department, City of Albuquerque, New Mexico. His main responsibilities include: overseeing enforcement and compliance actions and bringing them to resolution; reviewing inspection reports that have designated a source as out of compliance, to determine whether an enforcement action can or should be pursued; and drafting penalty calculations and notices of violation. Mr. Reyes is trained in an extensive array of manufacturing and industrial technologies and related air pollution control approaches, including optical gas imaging thermography, visible opacity reading, the Hazardous Waste Operations and Emergency Response Standard (HAZWOPER), stationary reciprocating engines, hot mix asphalt facilities, industrial boilers, and GRI-GLYCalc software. Mr. Reyes has worked for the City's Environmental Health Department for eleven years. He was previously employed by the Air

Quality Bureau, New Mexico Environment Department (2002 to 2005); Pueblo Office of Environmental Protection, All Indian Pueblo Council (2000 to 2002); Philips Semiconductor (1998 to 2000). He earned his B.S. in Environmental Science from the College of Santa Fe in May 2001.

3. **Text and Estimated Duration of Testimony**

Oral presentation of the combined testimony of Mr. Rocha and Mr. Reyes, Exhibits 1 and 3, is expected to require approximately 45 minutes.

4. **Text of Any Recommended Modifications to the Proposed Regulatory Change**

EHD does not recommend any modifications to the proposed regulatory change.

5. **List and Description of Exhibits**

EHD intends to introduce the following exhibits in support of the Petition.

<u>Number</u>	<u>Title</u>
1	Testimony of Dario W. Rocha
2	Resume of Dario W. Rocha
3	Testimony of Damon Reyes
4	Resume of Damon Reyes
5	Comment letter from Mark Burton, Singing Arrow Neighborhood Association, February 11, 2016
6	Letter from Ed Merta, Air Quality Regulation Development Coordinator, EHD, to Mark Burton, responding to comment, June 27, 2016
7	Comment letter from Marcus J. Rael, Jr., Robles, Rael, Anaya, on behalf of Western Refining Pipeline LLC et al., re: comments on pre-petition draft of EHD proposed Rule (March 2, 2016)
8	Letter from Ed Merta, Air Quality Regulation Development

Coordinator, EHD, to Marcus J. Rael, Jr., responding to Western Refining comments (June 27, 2016)

- 9 Email from Alan Shar, Environmental Engineer, P.E., Air Planning Section, EPA Region 6, to Ed Merta, EHD, re: EPA preliminary comments on pre-petition draft of EHD proposed rule (April 14, 2016).
- 10 Letter from Ed Merta, Air Quality Regulation Development Coordinator, EHD, to Alan Shar, Environmental Engineer, P.E., Air Planning Section, EPA Region 6, responding to EPA preliminary comments (June 3, 2016)
- 11 Letter from Guy Donaldson, Chief, Air Planning Section, EPA Region 6, to Ed Merta, EHD, re: further EPA comments on EHD proposed rule (July 7, 2016)
- 12 Analysis to satisfy requirements of Clean Air Act Section 110(l)
- 13 Proposed Statement of Reasons

6. **Reservation of Rights**

This Notice of Intent to Present Technical Testimony is based on EHD's Petition to Amend 20.11.49 NMAC – *Excess Emissions*, filed on June 27, 2016. If any other Notices of Intent are filed, EHD reserves the right to call any person identified in such other Notices of Intent, as well as any other person not already identified but who is necessary to present rebuttal testimony or to offer a rebuttal exhibit.

Respectfully submitted,

CITY OF ALBUQUERQUE

Jessica M. Hernandez

City Attorney

for


Carol M. Parker, Assistant City Attorney
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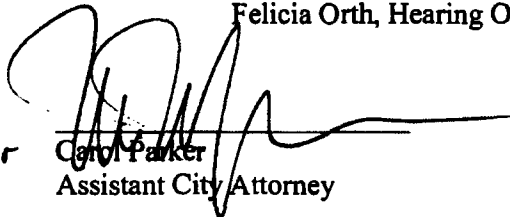
I certify that an original and fifteen copies of this Notice of Intent to Present Technical Testimony were served on August 29, 2016 as follows:

By hand-delivery to:

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Albuquerque-Bernalillo County Air Quality Control Board
One Civic Plaza, NW, Room 3023
Albuquerque, New Mexico 87103

And a single copy by electronic mail to:

Felicia Orth, Hearing Officer and Counsel for the Air Board, orthf@yahoo.com.

for 
Carol Parker
Assistant City Attorney

**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF
THE PETITION TO AMEND
20.11.49 NMAC – *EXCESS EMISSIONS***

**Environmental Health Department,
City of Albuquerque, Petitioner**

AQCB Petition No.2016-3

**TECHNICAL TESTIMONY
OF DARIO ROCHA**

My name is Dario Rocha and I am the Control Strategies Manager for the City of Albuquerque Environmental Health Department (“EHD”). My qualifications to present this technical testimony are provided in my resume, attached to the Notice of Intent as Exhibit 2.

I am testifying in support of EHD’s petition filed June 27, 2016 (“Petition”) before the Albuquerque – Bernalillo County Air Quality Control Board (“Air Board”). The Petition requested amendments of 20.11.49 NMAC – *Excess Emissions* (the “Regulation”) and removal of the Regulation from the State Implementation Plan (“SIP”).

This rulemaking involves several unfamiliar terms so I will begin with basic explanations of those terms. EHD’s Petition proposes to remove “affirmative defenses” for “excess emissions” from the provisions of the Regulation. It also proposes to remove the Regulation from the EPA-approved SIP, as required by a directive from the U.S. Environmental Protection Agency (“EPA”) known as a “SIP Call.”

An “excess emission,” in this context, means any emission of one or more air pollutants from a stationary source that violates either an emission limit in a regulation or a permit condition. A stationary source is any building, structure, facility or installation, or certain

groupings of buildings, structures, facilities, or installations, which are either permanent or temporary, excluding a private residence, that emits or may emit any regulated air pollutant.

An affirmative defense in the context of the Regulation is an assertion by the owner or operator of a stationary source [“Permittee”] that an excess emission couldn’t reasonably have been prevented and thus that a penalty should not be assessed for it.

A “SIP Call” by EPA, such as the one issued for 20.11.49 NMAC, is an EPA determination that a state or local SIP regulation is substantially inadequate to comply with the federal Clean Air Act and must be changed. In the SIP Call that concerns us here, EPA has determined that the affirmative defenses in 20.11.49 NMAC violate the Clean Air Act and must be removed from the SIP. “Affirmative defenses,” “excess emissions” and “SIP Call” are key terms that are important to understanding the issues presented in amending the Regulation.

The remainder of my testimony will discuss three subjects: (1) why EPA issued the SIP call; (2) how EHD’s Petition requesting amendments to 20.11.49 NMAC (“EHD’s Proposed Rule”) meets the SIP Call’s requirements; and finally, (3) how the procedural requirements to amend the Regulation have been met.

I. EPA’S SIP CALL IDENTIFIES SPECIFIC PROVISIONS IN 20.11.49 NMAC THAT MUST BE REMOVED FROM THE SIP

The EPA SIP Call of May 22, 2015 required EHD to remove the affirmative defenses in 20.11.49 NMAC, *Excess Emissions*, from the New Mexico SIP and make an appropriate SIP revision submittal to EPA no later than November 22, 2016.¹ The EPA SIP Call applied to excess emissions provisions of SIPs in 36 states, including those for Albuquerque and Bernalillo

¹ 80 Fed. Reg. 33,840 (June 12, 2015).

County, New Mexico. The SIP Call found that the Regulation was “substantially inadequate” under the Clean Air Act.²

In the SIP Call EPA stated that the affirmative defenses in 20.11.49 NMAC “impermissibly purport to alter or eliminate the jurisdiction of federal courts to assess penalties for violations of SIP emission limits,” in contravention of Sections 113 and 304 of the Clean Air Act.³ The SIP Call explained at length that Congress authorized the federal courts to determine what penalties should be assessed for violations of emission limits. Regulations that interfere with the federal courts’ authority to make those decisions, like a regulation creating an affirmative defense, are not acceptable. Three provisions in the Regulation create affirmative defenses.

First, Subsection A of 20.11.49.16 NMAC creates an affirmative defense for excess emissions during a malfunction; second, Subsection B of 20.11.49.16 NMAC creates an affirmative defense for excess emissions during startup and shutdown; and third, Subsection C of 20.11.49.16 NMAC creates an affirmative defense for excess emissions during emergencies. All three provisions, according to EPA, contain affirmative defense language incompatible with the Clean Air Act. EPA explains its rationale as follows:

² EPA’s authority to make such a finding arises under Section 110(k)(5) of the Clean Air Act, which provides that “whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standards, to mitigate adequately the interstate pollutant transport described in section 176A of this title or section 184 of this title, or to otherwise comply with any requirement of this act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.”

³ 79 Fed. Reg. 55,944 (September 17, 2014) (EPA supplemental notice of proposed rulemaking on excess emissions provisions in SIPs). The EPA SIP Call was published in the Federal Register on June 12, 2015, but the full reasons for EPA’s specific determination against Albuquerque – Bernalillo County’s 20.11.49 NMAC were fully described earlier, in a proposed supplemental rulemaking published September 17, 2014. *See* 80 Fed. Reg. 33,968 (June 12, 2015) (referencing the earlier proposed supplemental rulemaking for full SIP Call reasoning).

For each of these affirmative defense provisions, if the source is able to establish that it met each of the specified criteria to a trier of fact in an enforcement proceeding, then the provision purports to bar any civil penalties for those violations (and in the case of the affirmative defense for emergencies, could be construed to bar other forms of relief as well).⁴

EPA notes that removing these three provisions from the New Mexico SIP would be a sufficient response to EPA's SIP Call finding of substantial inadequacy under the Clean Air Act⁵.

EPA further notes that removal of the three affirmative defense provisions from the SIP would make other language in the regulation "superfluous and no longer operative."⁶ These provisions are:⁷

- 20.11.49.6 NMAC (specifying the creation of affirmative defenses as an objective of the regulation);
- Subsection B of 20.11.49.15 NMAC (describing procedure for a source to claim an affirmative defense);
- Subsection D of 20.11.49.16 NMAC (specifying circumstances where affirmative defenses are not available);

⁴ 79 Fed. Reg. 55,944 (September 17, 2014).

⁵ 80 Fed. Reg. 33,968 (June 12, 2015). Note that removing a regulation from the federally approved SIP is not the same thing as amending or repealing a state regulation in the New Mexico Administrative Code, although these two topics are closely related. All air quality regulations in the NMAC must be adopted by the Air Board, through a public hearing process. Thus, all of these regulations become state law. Subsequently, many of these regulations (not all) will be submitted to EPA for approval as part of the federally enforceable SIP and thus become federal law as well. For example, 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*, is not part of the SIP, because the Clean Air Act does not have detailed requirements for state rulemaking procedures. Similarly, a regulation in the NMAC that is in the SIP may be withdrawn from the SIP, through a request to EPA, while remaining on the books as a "state-only" regulation.

⁶ 80 Fed. Reg. 33,968 (June 12, 2015).

⁷ *Id.*

- Subsection E of 20.11.49.16 NMAC (specifying factors applicable when EHD determines the adequacy of a source's assertion of an affirmative defense);
- 20.11.49.18 NMAC (specifying that EHD may pursue future enforcement actions even after a source's assertion of an affirmative defense for an excess emission).

Removing these sections from the SIP, EPA notes, would also be a sufficient response to the SIP Call's determination of substantial inadequacy.⁸

EPA set a deadline of November 22, 2016 for Albuquerque – Bernalillo County (along with other states and localities) to submit an appropriate proposed SIP revision in response.⁹ If EPA determines that the City / County has failed to make such a submittal by the deadline, or if EPA disapproves the submittal as failing to meet Clean Air Act requirements, EPA may impose a Federal Implementation Plan (FIP) on the City / County within 24 months of EPA's finding of failure to submit.¹⁰ EPA may also impose sanctions on the City / County under Clean Air Act § 179(b), including restrictions on federal highway funding.¹¹

Albuquerque – Bernalillo County can avoid this outcome by responding to the EPA SIP Call in a timely manner according to requirements specified by EPA.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 33,849.

¹¹ *Id.* at 33,849, 33,940.

II. THE PROPOSED AMENDED REGULATION COMPLIES WITH ALL EPA SIP CALL REQUIREMENTS WHILE MAKING OTHER MINOR ADJUSTMENTS FOR CLARITY AND CONSISTENCY

In this section of my testimony, I will describe how EHD's Petition and the public review draft of the Regulation proposed by EHD respond to the requirements of EPA's SIP Call. I will also describe certain other changes EHD is proposing to 20.11.49 NMAC to improve the clarity and consistency of its language. The public review draft of EHD's Proposed Rule was filed with EHD's Petition for rulemaking on June 27, 2016.

EPA's SIP Call set forth a new policy on excess emissions, describing two options for how a state can respond to the SIP Call in a manner that EPA can potentially approve.¹² First, EPA said that a state or locality can seek EPA approval for regulations creating "alternative emission limitations" applicable only to specific, narrowly defined source categories during startup and shutdown operations (i.e. not malfunctions and emergencies).¹³ In other words, EHD would have to propose regulations defining specific numeric emission limits that take into account the necessarily higher emissions occurring during startup and shutdown for specific types of industrial sources. Pursuing this option would entail extremely complex technical and administrative work for EHD and regulated sources. The Air Board would have to hold complex, highly technical hearings on each proposed regulation. Each would require advance prediction of excess emissions during specialized modes of operation, i.e. during startup and shutdown, across a range of similar sources. Such predictions are extremely difficult, demanding a great deal of advance technical assessment and measuring, working closely with affected sources to

¹² See generally 80 Fed. Reg. 33,977 to 33,982 (June 12, 2015).

¹³ *Id.* at 33,978 to 33,980.

characterize inherently erratic bursts of air pollution that occur when specially designed equipment is turned on or off over a length of time. Following that effort, EHD would then have to propose the regulation to the Air Board, go through the local hearing process, secure Board adoption of the regulation, and then submit it to EPA for approval. EPA review and approval would, based on past experience, take at least two years and perhaps more. During that time, regulated sources would be left under uncertainty about whether EPA approval would be forthcoming or whether further modification of the regulation would be required. Even if EPA ultimately approved the regulation, any further change to equipment or practices in the regulated source category might require yet further modification of the regulation, resulting in a lengthy repeat of the cycle from pre-regulation technical assessment through the time consuming hearing and EPA approval process. EHD lacks the staff time and funding that would be required to perform such complex assessments, and the significant periods of uncertainty make it complicated to manage.¹⁴ Thus, EHD decided against pursuing this option.

EPA's SIP Call described a second option for responding to the SIP Call in a way that EPA could approve: the creation of "enforcement discretion" provisions in a state's or locality's excess emissions regulation that apply only to enforcement actions by a state or local agency, rather than EPA or citizen enforcement actions.¹⁵ Under this option, a state or local regulation adopted in response to the SIP Call would specify non-exclusive criteria that a state or local air agency might consider, if it so chooses, when evaluating whether to pursue an enforcement action for an excess emission during startup, shutdown, malfunction, or other exceptional

¹⁴ See *id.* at 33,912 to 33,917 for further details on the technical and administrative aspects of this "alternative emission limitations" approach.

¹⁵ *Id.* at 33,980 to 33,981.

circumstances, such as emergencies.¹⁶ The presence of such non-exclusive criteria in a regulation, EPA notes, does not limit the inherent enforcement discretion that a state or local agency exercises but merely establishes mechanisms or guidelines for how that discretion might be exercised.¹⁷ Specifically, EPA recommends that such criteria address the extent to which a Permittee reasonably tried to prevent and limit the excess emission. In particular, EPA recommended that the criteria include:¹⁸

- whether the Permittee maintained and operated its equipment properly;
- whether the Permittee quickly devoted available resources to repairs in order to minimize any permit violation;
- whether the Permittee tried to minimize the amount and duration of excess emissions;
- whether the Permittee tried to limit the impact of the excess emission on ambient air quality;
- whether the excess emission is part of a recurring pattern indicating inadequate design, operation, or maintenance of the source.

EPA policy makes clear that a state or local excess emissions regulation specifying enforcement discretion criteria as a response to the SIP Call must be carefully limited in other, specific ways. First, the criteria must apply only to the state or local agency as it exercises its own inherent enforcement discretion; the criteria must not place any limit whatsoever, expressly

¹⁶ *Id.* at 33,980 to 33,981.

¹⁷ *See, e.g., id.* at 33,848, 33,852, 33,905, 33, 980.

¹⁸ *Id.* at 33,980 to 33,981.

or by practical effect,¹⁹ on the discretion of EPA or citizens to pursue enforcement actions and seek specific remedies under Clean Air Act §§ 113 and 304.²⁰ Second, a regulation providing enforcement discretion criteria applicable to a state or local agency should also expressly state that it does not limit the freedom of federal courts under these two Clean Air Act provisions to determine liability and impose remedies in response to a violation of emission limits.²¹ Third, the regulation must not be written in a way that would compromise or preclude the state's or locality's ability to enforce federal air quality requirements, because doing so would violate the state's or locality's legal obligation under Clean Air Act § 110(a)(2)(C) to maintain adequate state or local legal authority for enforcement of Clean Air Act requirements.²² An automatic exemption from emission limit violations, for example, would run afoul of this mandate.²³ Fourth, enforcement discretion provisions must not have the effect of rendering an emission limitation less than continuous, because under Clean Air Act 302(k) such limits must apply continuously, without any period during which they do not apply to a source.²⁴ Automatic exemptions from emission limits violate this requirement as well.²⁵

EHD's public review draft of a proposed amended 20.11.49 NMAC, now before the Air Board in this rulemaking, was formulated so as to conform to the above requirements for an

¹⁹ *Id.* at 33,847, 33,926, 33,957.

²⁰ *Id.* at 33,923 to 33,924, 33,980 to 33,981. *See also* EPA comments on EHD's drafts of an amended 20.11.49 NMAC, Exhibits 9 and 11.

²¹ *Id.* at 33,923 to 33,924, 33,980 to 33,981. *See also* EPA comments on EHD's drafts of an amended 20.11.49 NMAC, Exhibits 9 and 11.

²² *Id.* at 33,923 to 33,924, 33,980 to 33,981.

²³ *See, e.g., id.* at 80 Fed. Reg. 33,927.

²⁴ *Id.* at 33,927.

²⁵ *Id.* at 33,927.

“enforcement discretion” response to the SIP Call. EHD consulted closely with EHD Region 6 staff during the drafting of EHD’s Proposed Rule.²⁶ As discussed in more detail in Mr. Reyes’ testimony, EHD’s Proposed Rule removes all language related to affirmative defenses from the Regulation and substitutes provisions relying on EHD’s enforcement discretion to address excess emissions episodes on a case by case basis. EPA Region 6 has stated that EHD’s Proposed Rule appears to be consistent with SIP Call requirements.²⁷

Based on a recommendation from EPA Region 6,²⁸ EHD also proposes the additional step of removing the entire amended 20.11.49 NMAC from the EPA-approved SIP. EPA’s recommendation appears in letters to EHD attached to this testimony as Exhibit 9 and Exhibit 11. Withdrawing 20.11.49 NMAC from the SIP does not repeal the Regulation. It just changes it from a federally enforceable rule to one that only applies to EHD enforcement. It would not, however, be listed in the Code of Federal Regulations as part of the SIP. EPA’s reason for requesting this step is that there is no requirement in the Clean Air Act for states or localities to have a regulation addressing enforcement provisions for excess emissions. EPA believes that 20.11.49 NMAC doesn’t need to be enforceable in federal administrative actions or lawsuits and, therefore, it does not need to be in the SIP. EHD agrees with EPA on this point. EHD requests that if the Air Board adopts EHD’s Proposed Rule, that the Board also authorize EHD to request EPA withdrawal of the entire Regulation from the federally approved SIP.

²⁶ Comments from EPA Region 6 on the proposed Regulation appear as Exhibits 9 and 11. EHD made the revisions to the Regulation suggested by EPA. These revisions are reflected in the Public Review Draft attached to EHD’s Petition for rulemaking. *See also* EHD’s response letter to EPA, Exhibit 10.

²⁷ *See* comment letter from Guy Donaldson, Chief, Air Planning Section, EPA Region 6, July 7, 2016, Exhibit 11. EPA Region 6 has reiterated in telephone consultations that the enforcement discretion approach is consistent with federal Title V regulations, unlike the state-only affirmative defense approach.

²⁸ *See* EPA comments in Exhibits 9 and 11.

In addition to addressing the EPA concerns described above, EHD's Proposed Rule must also demonstrate that air quality will be maintained and all other Clean Air Act requirements will be met following the proposed SIP revision.²⁹ This condition flows from Clean Air Act Section 110(l), which requires EPA to determine that any proposed SIP revision will not "interfere with any applicable [Clean Air Act] requirement concerning attainment and reasonable further progress or any other applicable requirements" of the Clean Air Act. Exhibit 12, attached to the Notice of Intent to present this technical testimony, describes how amending 20.11.49 NMAC and withdrawing it from the SIP would meet EPA requirements related to Section 110(l). EHD formulated this document in consultation with EPA Region 6.

Finally, EHD's draft proposes certain other changes, not specifically required by EPA's SIP Call, to improve the overall clarity of 20.11.49 NMAC. These changes, to which EPA has no objection, will facilitate both compliance by Permittees and implementation by EHD. The changes are as follows.

- Subsection C of 20.11.49.13 NMAC, p. 2, line 54. This change corrects a citation error regarding the proper title of another NMAC provision.
- 20.11.49.14 NMAC, p. 3, lines 5 to 11. This change adds additional language to clarify a source owner or operator's responsibility to minimize any excess emission that might occur during operation of the source.
- Subsection A of 20.11.49.15 NMAC, p. 3, lines 18 and 19. This change simplifies the language used to refer to certain information that EHD might require from a Permittee.

²⁹ 80 Fed. Reg. 33,975 (June 12, 2015); *see also* comment letter from Guy Donaldson, Chief, Air Planning Section, EPA Region 6, July 7, 2016, Exhibit 11

- Paragraphs (1) and (2) of Subsection A of 20.11.49.15 NMAC, p. 3, lines 20 and 23; Subsection B of 20.11.49.15 NMAC, p. 3, line 26. This change more clearly specifies that the initial “excess emissions report” in 20.11.49.15 NMAC is a different document than the “supplemental report” described in 20.11.49.16 NMAC.
- Subsection B of 20.11.49.15 NMAC, p. 3, lines 30 to 32 and p. 4, lines 1 to 3. These changes insert new language to clarify information required in an excess emissions report.
- Paragraph 10 of Subsection A of 20.11.49.16 NMAC, p. 5, line 10 and Paragraph 10 of Subsection B of 20.11.49.16 NMAC, p. 5, line 36. These changes more clearly communicate that all notification requirements in 20.11.49.15 NMAC, rather than merely some of them, must be met when filing a supplemental report regarding a malfunction.
- Subsection C of 20.11.49.16 NMAC, p. 5, lines 37 to 56, p. 6, lines 1 to 9. These changes, besides removing the concept of “affirmative defenses” from the Regulation, also make the requirements for a supplemental report on an emergency more consistent with those required for supplemental reports during startup, shutdown, and malfunction.
- Subsection B of 20.11.49.17 NMAC, p. 7, line 5. This change makes more explicit that the “analysis” being referred to in this subsection is in fact the root cause and corrective action analysis that is the subject of this section of 20.11.49 NMAC.

III. EHD’S RESPONSE TO COMMENTS

During the pre-rulemaking stakeholder comment period, EHD received comments from two stakeholders. Those comments and EHD’s responses are included attached as Exhibits 5, 6, 7, and 8.

The first comment was a list of questions from a member of the public asking for an explanation of the regulatory change EHD was proposing.³⁰ EHD provided an explanation in its response.³¹

The second set of comments was from Western Refining.³² Western Refining advocated removing the affirmative defense provisions only from the SIP while keeping the affirmative defense language in 20.11.49 NMAC as a "state only" rule.³³ EHD understands that the New Mexico Environment Department intends to recommend this type of response to the SIP Call to the Environmental Improvement Board.

If EHD proposed such an approach and the Air Board adopted it, such action would remove 20.11.49 NMAC from the SIP but leave all of its language unchanged, including the language on affirmative defenses. 20.11.49 NMAC would then remain on the books as a "state only" Regulation, exactly as it appears now, but the Regulation would no longer be federal law enforceable by EPA or citizen lawsuits under the Clean Air Act. Only EHD would be able to enforce it, either in its own administrative action or state court. Affirmative defenses would still be part of the Regulation, but no longer in violation of the Clean Air Act because they would no longer be part of the EPA-approved SIP. Under this approach the Air Board, instead of adopting the amended regulatory language recommended in EHD's Petition, would approve only an EHD request for EPA to remove 20.11.49 NMAC in its entirety from the EPA-approved SIP. EPA's

³⁰ Exhibit 5.

³¹ Exhibit 6.

³² Exhibit 7. EHD's letter in response is Exhibit 8.

³³ The term "state only" regulation is used in this context because 20.11.49 NMAC, as part of the New Mexico Administrative Code, is incorporated into the body of state regulations, even though it applies only within Albuquerque and Bernalillo County.

SIP call indicates that such a response to the SIP Call is potentially approvable.³⁴ EPA Region 6 has confirmed this understanding in discussions with EHD staff and legal counsel.

EHD decided against this “state only affirmative defenses” approach because it suffers from a fatal disadvantage that EHD’s Proposed Rule does not. While EPA Region 6 has informed EHD that state only affirmative defenses would meet EPA’s SIP Call requirements under Title I of the Clean Air Act, they would violate EPA’s regulations governing state Title V permit programs. Title V is a section of the Clean Air Act that applies to very large sources (with some potential exceptions).

In conversations with EHD staff and counsel, EPA Region 6 has indicated that 40 CFR § 70.11(a)(3) requires an air agency to maintain sufficient authority under state or local law to recover civil penalties in court for emission limit violations.³⁵ The existing version of 20.11.49 NMAC conflicts with this requirement, according to EPA, because in three different provisions the Regulation creates affirmative defenses applicable to civil penalties in a judicial enforcement action.³⁶ These affirmative defenses, left unchanged, limit or restrict EHD’s enforcement authority. They mean that if a Permittee can meet the factual criteria for the affirmative defenses, it is protected against civil penalties in a court action. This restriction on the legal authority of EHD to recover such penalties, EPA has stated, violates 40 CFR § 70.11(a)(3), even if 20.11.49 NMAC is removed from the SIP.

³⁴ 80 Fed. Reg. 33,855 to 33,856 (June 12, 2015).

³⁵ The regulation reads in relevant part: “Any agency administering a [Title V permit] program shall have... enforcement authority...[t]o assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, according to the following:(i) Civil penalties shall be recoverable for the violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry or monitoring activities or, any regulation or orders issued by the permitting authority. These penalties shall be recoverable in a maximum amount of not less than \$10,000 per day per violation.”

³⁶ See Subsections A, B, and C of 20.11.49.16 NMAC.

Region 6 further informed EHD that responding to the SIP Call by leaving the existing affirmative defenses in 20.11.49 NMAC unchanged, as a state only regulation, could lead EPA to issue a subsequent notice of deficiency against Albuquerque – Bernalillo County’s Title V permitting program. Such a notice would require a new rulemaking to amend 20.11.49 NMAC to remove the state only affirmative defenses. Failure to do so could result in an EPA takeover of Title V permitting authority in the City / County jurisdiction. Such a situation would mean that permitting authority over large sources in Albuquerque and Bernalillo would be removed to the EPA.

EHD recommends against the state only rule with affirmative defenses. EPA has informed EHD that the draft Regulation now before the Air Board would not create such risk because it removes affirmative defenses from the Regulation and instead relies simply on EHD’s exercise of its inherent enforcement discretion based on information reported by the Permittee. EHD believes that deliberately leaving unchanged a regulation known to conflict with a federal requirement is not an advisable course of action.

IV. ALL LEGAL REQUIREMENTS NECESSARY FOR THIS HEARING HAVE BEEN MET

The Air Board has legal authority necessary under state law to adopt the amended 20.11.49 NMAC as proposed by EHD. The Air Board is authorized to adopt amended regulations under NMSA 1978 § 74-2-5(B)(1) (“Air Act”), Revised Ordinances of the City of Albuquerque (“ROA”) § 9-5-1-4, and Bernalillo County Ordinances § 30-35.


EHD has met the procedural requirements for this hearing as specified by the Air Act, local ordinances, and the Air Board's regulations. EHD petitioned this Board for a regulatory change on June 27, 2016, in the manner required by NMSA 1978 § 74-2-6(A, B), ROA § 9-5-1-

6(A), Bernalillo County Ordinances § 30-35(a), and 20.11.82.18 NMAC - *Rulemaking Procedures – Air Quality Control Board*. EHD gave thirty days' notice of the hearing, as required by NMSA 1978 § 74-2-6(C), ROA § 9-5-1-6(C), Bernalillo County Ordinances § 30-35(c), and 20.11.82.19 NMAC. EHD properly filed its Notice of Intent to Present Technical Testimony, as required by 20.11.82.20 NMAC. See Notice of Intent to Provide Technical Testimony, (August 29, 2016).

V. CONCLUSION

Because EPA requires removal of affirmative defenses from the New Mexico SIP, and because their replacement in the proposed amended Regulation with state-only enforcement-discretion criteria complies with EPA requirements, EHD respectfully requests that the Air Board adopt the proposed regulatory changes to 20.11.94 NMAC, *Excess Emissions* and approve a request for EPA to remove the entire Regulation from the SIP as recommended by EPA.

Respectfully submitted,


Dario Rocha

DARIO W. ROCHA

EDUCATION

Bachelor of Science in Mechanical Engineering, New Mexico State University, December 1989.

TRAINING

NACT Stationary Reciprocating Engines, 6/2013
NACT 272 Stationary Gas Turbines & Power Plants 6/2013
NACT 273 Industrial Boilers, 6/2013
NACT 299 Theory & Application of Air Pollution Control Devices, 6/2013
OSHA 8 Hour Hazardous Waste Operations & Emergency Response Refresher , 11/2006
DOT Transportation of Hazardous/Radioactive Materials, 8/1995
OSHA 40 Hour Hazardous Waste Operations & Emergency Response Training, 3/1995
DOT Transportation of Hazardous/Radioactive Materials, 8/1995
OSHA 40 Hour Hazardous Waste Operations & Emergency Response Training 3/1995

EXPERIENCE

ENVIRONMENTAL HEALTH MANAGER, City of Albuquerque Environmental Health Department, Control Strategies Division. November 2015 to present.

- Responsible for overseeing operations for the Environmental Health Department's Control Strategies Division
 - Manage and direct staff in State Implementation Plan (SIP) revisions including regulation development, public participation, and stakeholder outreach
 - Serve as the Secretary to the Albuquerque Bernalillo County Air Quality Control Board (Air Board). Facilitate meetings and hearings before the Air Board for adopting air quality control regulations and adjudicatory proceedings.
 - Serve on two transportation planning committees for advising the Metropolitan Transportation Board of the Mid Region Council of Governments.
 - Ensure that all regulatory timelines are met for Department related public records requests.
 - Manage and direct staff in providing air quality permit application development services under the Small Business Assistance Program. Ensure that the services to small businesses are provided in a timely manner.

ENVIRONMENTAL HEALTH SUPERVISOR, City of Albuquerque Environmental Health Department, Vehicle Pollution Management Division. December 2013 to November 2015.

- Responsible for overseeing the Inspection and Maintenance program for the City's Vehicle Pollution Management Division (VPMD)
 - Manage and direct staff in conducting quality assurance audits of all vehicle pollution emissions testing facilities (Air Care Stations) and inspectors (Air Care Inspectors) within the Albuquerque metropolitan area.
 - Manage and direct staff in conducting vehicle emissions testing at the City of Albuquerque's Vehicle Pollution Management Program Headquarters.
 - Assist in preparing VPMD budget by revenue analysis.
 - Prepare Notice of Violation for non-compliant Air Care stations and Air Care Inspectors.
 - Conducted hearings and settlement agreements with non-compliant Air Care station owners and Air Care inspectors.
 - Responsible for overseeing the Emissions Inventory program for stationary and mobile sources.
 - Work closely with other Environmental Health Department Divisions on regulatory development

ENVIRONMENTAL HEALTH SUPERVISOR, City of Albuquerque Environmental Health Department, Permitting Division. April 2005 to December 2013.

- Supervise and direct staff in the Permitting & Technical Analysis Section for the Air Quality Division.
- Assign air quality permit applications for NSR and Title V air permitting programs.
- Make applicability determinations for air quality permitting.
- Review and approve portable stationary source relocations within Bernalillo County.
- Prepare and approve air quality permits for minor and major stationary sources.
- Responsible for ensuring all air quality permits for minor and major stationary sources are issued or denied within their respective regulatory or statutory timeframes.
- Responsible for ensuring that stationary source air quality emissions inventories are prepared in accordance with 40 CFR 51 Subpart A.

ENVIRONMENTAL HEALTH SCIENTIST, City of Albuquerque Environmental Health Department Air Quality Division. April 2003- April 2005

- Primary duty- served as the lead Permitting Specialist
- Served as acting supervisor for the AQD's Permitting and Technical Analysis Section. Assigned permit applications to staff if time constraints became a concern.
- Responsible for knowing the characteristics of the NSR and Title V air quality permitting programs
- Conducted technical reviews of over 85 New Source Review (NSR) and Source Registration air quality permits written by permitting staff.
- Prepared air quality permits for larger sources or permits that were technically challenging in nature such as synthetic minor NSR and Title V sources.

- Conducted applicability determinations for air pollution sources using local, state, and federal laws and regulations.
- Participated in AQD's development efforts in response to changes in air quality regulations and policies. Assisted with fiscal end-of-year permitting program priorities with EPA Region 6.
- Interfaced with EPA Region 6 in periodic conference calls.
- Provided testimony and/or input at public hearings, Albuquerque/Bernalillo County Air Quality Control Board meetings and public information meetings.

ENVIRONMENTAL HEALTH SPECIALIST II, City of Albuquerque Environmental Health Department, Air Quality Division. September 2000- April 2003

- Primary duty- issued Title V Operating permits.
- Maintained the Title V permitting program.
- Issued New Source Review permits.
- Assisted as needed in supporting the Air Quality Division with special projects or tasks.

ENVIRONMENTAL SPECIALIST F, State of New Mexico- Air Quality Bureau, Santa Fe, New Mexico. October 1997- September 2000

- Reviewed and processed Title V (operating permit) applications for sources regulated by the State of New Mexico. Maintained the Title V permit program by updating permit templates, monitoring protocols, and permit applications.
- Conducted site visits to various industrial facilities requiring a Title V permit. Interfaced with source applicant's personnel in matters regarding operating permit processing.
- Assigned various special projects to attain Environment Department/Air Quality Bureau goals. Projects include:
 - Streamlining the New Source Review (NSR) permit processing schedule.
 - Worked with a team to develop a New Source Review Training Manual
 - Chosen to be a member of the Cerro Grande Fire air monitoring team in a joint effort with the EPA and DOE
 - Assigned to a team to develop a new Environment Department integrated database by helping create a library of standard permit conditions for NSR and Title V permitting programs as well as working directly with the vendor to customize the system for the Air Quality Bureau.

HEALTH & SAFETY OFFICER/HEATH PHYSICS TECHNICIAN, Environmental Restoration Group Inc., Albuquerque, New Mexico. July 1993- August 1997

- Assigned to ARCO/Whiting Petroleum Smackover Pool Unit "NORM" site near Magnolia, AR. Assisted in performing a radiological site characterization which included directing the gamma survey and soil sampling teams in a NORM contaminated oil field and analyzing soil samples using a gamma spectrometer. Also served as the Health and Safety Officer for the project.

- Environmental Consultant for DOW Chemical THORAD Project in Bay City, MI. Responsible for implementing the environmental monitoring program including air sampling equipment calibration and deployment and computer spreadsheet development.
- Environmental Monitoring Technician at DOE FUSRAP site in Wayne, NJ. Responsible for implementing the environmental monitoring program including work area and environmental air sampling stations, radon monitoring, and exposure rate measurements. Also conducted release surveys and personnel contamination monitoring. Operated gamma-ray spectrometer for Ra-226 and Th-232 assay. Prepared shipping manifests for the disposal at Envirocare of Utah Facility.
- Lead Technician for conducting radiological surveys at various sites using GPS-based gamma survey system. Surveys were done at Los Alamos National Laboratory, Brookhaven National Laboratory, Kirkland Air Force Base, and several other sites owned by industry. Performed some mapping of radiological data using Geographic Information Systems (GIS).
- Assigned to ARCO Bluewater Mill reclamation project. Duties included serving as the site owner's field representative by directing the remedial contractors' activities to assure compliance with the work specifications and the environmental, health, and safety requirements. Also served in various other capacities including developing standard operating procedures, environmental sampling, sample preparation, radiation surveys, instrument calibrations and laboratory analyses.

ENGINEER, Houston Lighting & Power Company, Fossil Plant Engineering Dept., Houston, Texas. 1990-1992

- Responsible for mechanical design of assigned projects for the improvement and regulatory modification of fossil-fuel power plants. Provided the design and engineering for the installation of various equipment such as potable water systems, piping, pumps, air, compressors, tanks, and chemical feeding systems
- Prepared engineering design calculations
- Prepared procurement specifications and conducted bid evaluations for engineered equipment
- Coordinated with other engineering disciplines, construction dept., purchasing department, and plant personnel to support project completion
- Developed engineering drawings and installation specifications
- Developed "Engineering Design Plans" for budgetary purposes

KNOWLEDGE, SKILLS, AND ABILITIES

- Able to speak, read, and write Spanish
- Ability to speak in public forums and conduct presentations in front of governmental appointed boards
- Proficient in interpreting and applying federal, state, and local laws and regulations

**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF PETITION TO AMEND
20.11.49 NMAC – *EXCESS EMISSIONS***

**Environmental Health Department,
City of Albuquerque, Petitioner**

AQCB Petition No.2016-3

**TECHNICAL TESTIMONY
OF DAMON REYES**

My name is Damon Reyes and I am the Compliance and Enforcement Division Manager for the City of Albuquerque Environmental Health Department (“EHD”). My qualifications to present this technical testimony are provided in my resume, attached to the Notice of Intent to present technical testimony as Exhibit 4.

I am testifying in support of EHD’s petition filed June 27, 2016 (“Petition”) before the Albuquerque – Bernalillo County Air Quality Control Board (“Air Board”) which requested amendments of 20.11.49 NMAC – *Excess Emissions* (the “Regulation”) and requested removal of the Regulation from the State Implementation Plan (“SIP”).

My testimony will proceed as follows. First, I will describe how the existing 20.11.49 NMAC addresses excess emissions. Second, I will describe changes EHD is proposing in the language of the Regulation (“EHD’s Proposed Rule). Third, I will describe how EHD enforcement actions would work under the new Regulation.

I. BACKGROUND: UNDERSTANDING “EXCESS EMISSIONS” AND HOW EHD ADDRESSES THEM UNDER THE EXISTING 20.11.49 NMAC

“Excess emissions” are unexpected emissions that violate an emission limit in a permit or regulation.¹ 20.11.49 NMAC addresses excess emissions at four different times: startup, shutdown, malfunction, and emergencies. In the context of excess emissions, *startup*, as the name suggests, is when equipment is turned on², *shutdown* is when it is turned off³, *malfunction* is a period when equipment unexpectedly fails to function normally⁴, and an *emergency* is when some external force, such as a natural disaster or an act of God, interferes with the normal operation of a facility and causes an excess emission.⁵ Mr. Rocha’s testimony provides additional explanation of important terminology used in this rulemaking.

Here is a hypothetical example of how an excess emission might occur.⁶ Suppose a manufacturing facility in an urban area is operating normally, producing products for market on

¹ The current 20.11.49 NMAC defines “excess emission” as “the emission of an air contaminant, including a fugitive emission, in excess of the quantity, rate, opacity, or concentration specified by an air quality regulation or permit condition.” EHD’s draft amended 20.11.49 NMAC would retain this definition.

² The current 20.11.49 NMAC defines “startup” as “setting into operation any air pollution control equipment or process equipment.” EHD’s draft amended 20.11.49 NMAC would retain this definition.

³ The current 20.11.49 NMAC defines “shutdown” as “the cessation of operation of any air pollution control equipment or process equipment.” EHD’s draft amended 20.11.49 NMAC would retain this definition.

⁴ The current 20.11.49 NMAC defines “malfunction” as “any sudden and unavoidable failure of air pollution control equipment or process equipment beyond the control of the owner or operator, including malfunction during startup or shutdown. A failure that is caused entirely or in part by poor maintenance, careless operation, or any other preventable equipment breakdown shall not be considered a malfunction.” EHD’s draft amended 20.11.49 NMAC would retain this definition.

⁵ The current 20.11.49 NMAC defines “emergency” as “any situation arising from sudden and reasonably unforeseeable events beyond the control of the permittee, including acts of God or nature, which situations requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventive maintenance, or careless or improper operation.” EHD’s draft amended 20.11.49 NMAC would retain this definition.

⁶ Note that this example is for illustrative purposes only. Actual incidents of excess emissions are not possible to predict in advance and EHD cannot speculate in advance on how it might handle a particular incident.

an assembly-line basis. The manufacturing process uses certain specialized machinery. This machinery produces emissions of various regulated pollutants, such as particulate matter and sulfur dioxide. As required by its air quality permit, the firm has installed emissions control technology to properly reduce its pollutant emissions to levels allowed under the permit. The firm that owns this facility has taken care to keep the manufacturing machinery and air pollution control technology well maintained, inspecting and replacing parts and processes as necessary. One morning, without any advance warning, the manufacturing machinery malfunctions. Employees hear a loud, booming noise, immediately after which the assembly line grinds to a halt as the manufacturing machinery goes offline. This breakdown is followed by massive, uncontrolled emissions of particulate matter and sulfur dioxide into the air, directly caused by the equipment breakdown. The air pollution control technology fails to stop the emissions. The amount of emissions is far beyond the levels allowed under the facility's air pollution permit. Thus, by definition the owner/operator has violated its permit. Company employees immediately take action to bring the emissions under control by bringing the manufacturing machinery and air pollution control technology back into operation, using well established, industry-standard procedures for doing so. An investigation by employees reveals that a key part in the manufacturing machinery contained an inherent defect, present at the time the part was fabricated by an outside contractor, which could not have been detected in advance. This hypothetical example illustrates an excess emission caused by a malfunction. Other, similar examples might be imagined for the categories of startup, shutdown, or emergency.

20.11.49 NMAC was adopted in order to address incidents of this kind. Even though such incidents result in a permit violation, 20.11.49 NMAC in its current form was intended to

provide relief from penalties for such violations – when relief is warranted due to extenuating circumstances beyond the permittee's control.

The existing enforcement process for excess emissions works as follows under the current version of 20.11.49 NMAC. When the owner or operator of a stationary source with an air quality permit ("Permittee") experiences an excess emission, such as the hypothetical malfunction described above, 20.11.49.15 NMAC requires a Permittee to file an "initial" report to EHD about any excess emission, regardless of whether it was preventable. The initial report must contain all information available at the time about the incident. 20.11.49 NMAC further requires a "final" report on the excess emission, addressing all items in an enumerated list of information that must be submitted about the incident. This list includes items such as how large the excess emission was, why it happened, and what action the permittee took to contain it.

As part of this final report, a Permittee must state whether or not it will file a claim of an affirmative defense for the excess emission. The Permittee must do so by a specified deadline. An affirmative defense may be claimed for an excess emission during startup, shutdown, malfunction, or emergency, contending that the incident couldn't reasonably have been prevented and thus wasn't the Permittee's fault. The Permittee is required to document this claim with a variety of information about the circumstances of the incident. EHD's Enforcement and Compliance Division evaluates the information and determines whether the Permittee has demonstrated the facts necessary for an affirmative defense to be established. If the Permittee has done so, relief from civil penalties will be warranted. If EHD decides such relief is not warranted, the Permittee may appeal the decision to the state Court of Appeals and argue that, contrary to EHD's determination, the Permittee did establish the facts necessary for an affirmative defense to prevail. If the Court agrees, EHD's penalty assessment will be overturned.

EHD is proposing amendments to the Regulation because the U.S. Environmental Protection Agency (“EPA”) has determined the current version violates the Clean Air Act. The next part of my testimony will describe how the amended Regulation in EHD’s Proposed Rule would work in the context of EHD’s compliance and enforcement activities.

II. EHD IS REPLACING AFFIRMATIVE DEFENSES WITH A SUPPLEMENTAL REPORTING PROCESS IN WHICH EHD WOULD EXERCISE ENFORCEMENT DISCRETION TO ADDRESS EXCESS EMISSIONS

The purpose of 20.11.49 NMAC is to describe procedures for how EHD will respond to incidents of excess emissions under the situations I described above. The existing version of the Regulation does so by allowing sources to file claims for affirmative defenses. The new version proposed by EHD would eliminate affirmative defenses but could lead to a similar end result, as I’ll describe below.

EHD’s draft Regulation removes the term “affirmative defenses” from the Regulation and replaces it with the term “supplemental report.”⁷ Instead of filing an assertion of an affirmative defense, as under the existing Regulation, a Permittee would instead file a supplemental report that requires it to demonstrate essentially the same facts as it would have had to prove to assert an affirmative defense. Under the existing Regulation and the proposed new draft, the facts to be shown are functionally equivalent for startup, shutdown, malfunction, and emergency. In each situation, as before, the source must still show in a report to EHD that extenuating circumstances occurred. The Permittee can still request relief from civil penalties that would otherwise apply for the emission limit violation. The determination of whether a Permittee has shown sufficient facts to warrant relief from penalties still resides with EHD.

⁷ See the public review draft of the proposed amended 20.11.49 NMAC at p. 1, lines 28-30, p. 3, lines 50 to 56; p. 4, lines 13 to 48; page 5, lines 14 to 22 and 40 to 56; page 6, lines 1 to 44.

When penalties are warranted, EHD will still retain the discretion to decide, based on its assessment of the circumstances, what penalties are most appropriate to a particular situation.

A more detailed description of the major features of the new, amended Regulation, as set forth in the draft attached to EHD's Petition, is as follows. Like the existing Regulation, EHD's Proposed Rule would require a Permittee to file both an initial and final report describing specific information about an excess emissions incident, regardless of whether it was preventable or not.⁸ In the final report, instead of claiming an affirmative defense for an incident during startup, shutdown, malfunction, or emergency, the Permittee may state that it intends to file a later, "supplemental report." In the supplemental report, the Permittee will ask to be relieved of civil penalties for the excess emission based on extenuating circumstances beyond its control. EHD's Proposed Rule describes the information that must be in the supplemental report. It requires that specific information be submitted to EHD about the circumstances of an excess emission that occurred as a result of startup, shutdown, malfunction, or emergency. The information is similar for each category of incident. It includes criteria to be addressed such as whether the excess emission was part of a recurring pattern of such incidents, whether the source followed proper practices for emission control, and whether all possible steps were taken to minimize the amount of the excess emission.

EHD's Proposed Rule goes on to describe how EHD will act on the information submitted in a supplemental report. It specifies situations in which information in a supplemental report requesting relief from civil penalties will not be considered by EHD. Such situations include exceedance of a National Ambient Air Quality Standard or Prevention of Significant Deterioration increment under the Clean Air Act or failure to meet federally promulgated

⁸ 20.11.49.15 NMAC and 20.11.49.16 NMAC in EHD's Proposed Rule.

emission limits appearing in the Code of Federal Regulations.⁹ The final decision whether the information in a supplemental report justifies relief from civil penalties rests with EHD.

The new version of 20.11.49 NMAC does not allow affirmative defenses but it does provide a process that allows a Permittee to request relief from penalties for emissions that could not be prevented. As was the case with assertions of an affirmative defense, filing a supplemental report will submit information to EHD attempting to show that an excess emission couldn't have been prevented and thus wasn't the Permittee's fault. As was the case with affirmative defenses, EHD will assess the adequacy of a supplemental report and decide whether relief from civil penalties is warranted. As was the case with affirmative defenses, a source retains the right to challenge EHD's final enforcement decision in the Court of Appeals. The difference between the two versions of the Regulation is that, as EPA has described in its SIP Call, an affirmative defense might restrict the discretion of a court to impose penalties, and under the Clean Air Act Clean Air Act this isn't allowed.

As required by EPA's SIP Call, the language in EHD's draft of the new Regulation unequivocally states that the Regulation applies only to enforcement decisions by EHD. The draft specifically disclaims any intent to limit the authority of EPA to bring its own enforcement actions under Section 113 of the Clean Air Act, or the right of citizens to pursue enforcement actions under Section 304 of the Clean Air Act, or the jurisdiction and discretion of federal courts to find liability and impose remedies under Sections 113 and 304 of the Clean Air Act. This shared enforcement responsibility of state and local agencies, EPA, and citizens at large is an essential feature of the overall enforcement framework of the Clean Air Act.

⁹ Subsection D of 20.11.49.16 NMAC in EHD's Proposed Rule.

III. ENFORCEMENT ACTIONS UNDER THE AMENDED 20.11.49 NMAC CAN LEAD TO A SIMILAR END RESULT AS BEFORE

In the end, EHD's Proposed Rule can lead to an end result similar to what has occurred in the past using affirmative defenses. If an excess emission was truly unpreventable, EHD anticipates using its enforcement discretion to relieve a Permittee from penalties for it.

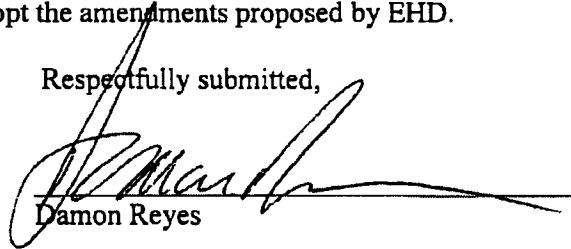
EHD anticipates that this regulatory change will have minimal impact on the day to day operations of Permittees. The process of filing a supplemental report will be similar to claiming an affirmative defense. The Permittee will file the same type of paperwork explaining the circumstances of the excess emission and will meet essentially the same regulatory requirements on specific facts that must be shown. The only difference in the work being done will be that now the paperwork and facts contained therein will be part of a "supplemental report" rather than a claim to an "affirmative defense."

When an excess emission was truly unforeseeable and unpreventable, and wasn't part of a recurring pattern of such incidents based on improper business practices and air quality regulatory compliance, and thus not the fault of the Permittee, the amended 20.11.49 NMAC would allow EHD to assess the facts of a situation and determine that civil penalties are not warranted.

IV. CONCLUSION

The new enforcement discretion criteria in the amended 20.11.49 NMAC would give EHD flexibility to address specific instances of excess emissions on a case-by-case basis. I respectfully request that the Air Board adopt the amendments proposed by EHD.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Damon Reyes", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Damon Reyes

Education and Work Background of City Technical Witness
Damon Ray Reyes

AFFILIATION AND TITLE

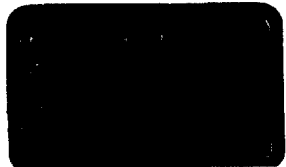
Environmental Health Manager, Enforcement and Compliance Division, Air
Quality Program, Environmental Health Department, City of Albuquerque, New
Mexico

EDUCATION

B.S. in Environmental Science, College of Santa Fe, May 2001

TRAINING

Optical Gas Imaging Thermographer – 1/14/15
CARB Surface Coating – 12/16/09
Certification of Visible Opacity Reading – 11/5/09
Intro to Criminal Environmental Investigations – 11/14/09
HAZWOPER – 5/14/09
Combined Air, RCRA & NPDS Inspector Training – 4/14-16/09
Permit Writing II – 9/28/07
NACAA/EPA Permitting Workshop – 2/26-28/07
NSR Reform Workshop – 10/7/06
Stationary Reciprocating Engines – 4/20/06
Hot Mix Asphalt Facilities – 4/18/06
Industrial Boilers – 4/17/06
NSR Reform – 10/7/05
Effective Permit Writing – 2/15-17/05
Gri-Glycalc – 1/05
Sources and Control of VOC Air Pollutants – 5/18-21/04
Particulate and Gas Control – 5/04
6th Annual Inspectors Workshop – 5/6-8/03
Stack Testing – 2/03
Applied Principles of Engines and Compressors – 11/02
Engine Emissions Stack Testing
& Analyzer Workshop – 10/15-17/02
Continuous Emission Monitoring Systems – 3/02
National Enforcement Training Institute-Basic BEN 1/30-31/02
National Enforcement Training Institute-Basic PROJECT – 1/28/02
National Enforcement Training Institute-Basic MUNIPAY – 1/28/02
National Enforcement Training Institute-Basic ABEL – 1/29/02
National Enforcement Training Institute-Basic INDIPAY – 1/29/02
Sampling for Hazardous Materials – 4/10-12/01
Field Based Site Characterization Technologies – 11/3/00
Guidance for Performing Site Assessments Under CERCLA – 3/99
Guidance for Performing Site Inspections Under CERCLA – 3/99
Hazard Ranking System – 12/98



EXPERIENCE

I have over 18 years of experience working in the environmental field. This experience includes time in the private sector as well as the public sector, where I have worked at the Federal, State, and local levels. During my time at the New Mexico Environmental Department's Air Quality Bureau and with the City of Albuquerque's Air Quality Program, I have overseen/been involved with the inspection of over 1000 regulated sources.

ENVIRONMENTAL HEALTH MANAGER, ENFORCEMENT AND COMPLIANCE DIVISION, Air Quality Program, Environmental Health Department, City of Albuquerque: February 2014 – Present.

- Main responsibility is to oversee enforcement and compliance actions and bringing them to resolution.
- Review inspection reports that have designated the source as out of compliance, and then determine if an enforcement action can be pursued.
- Draft penalty calculations and notices of violation.
- Plan and oversee budgets for the Enforcement and Compliance Division.

ENVIRONMENTAL HEALTH SUPERVISOR, ENFORCEMENT SECTION, Air Quality Program, Environmental Health Department, City of Albuquerque: May 2008 – February 2014

- Main responsibility is to oversee enforcement staff's regulation of stationary sources, fugitive dust sources, asbestos, open burning and wood burning.
- Review enforcement staff's inspection reports, and to make determinations on enforcement actions.
- I am responsible for staying current with changes to local regulations, as well as any revisions or newly promulgated federal regulations.

ENVIRONMENTAL HEALTH SCIENTIST, Air Quality Program, Environmental Health Department, City of Albuquerque: July 2005 – May 2008

- Main responsibility was to review air quality permit applications and draft permits in accordance with local, state, and federal regulations.
- I was responsible for staying current with changes to local regulations, as well as any revisions or newly promulgated federal regulations.

- Additionally, I was the Lead Permitting Specialist responsible for mentoring new permitting staff and providing technical review of permitting staff draft permits.

ENVIRONMENTAL HEALTH SCIENTIST, Air Quality Bureau, New Mexico Environment Department: February 2002 – July 2005

- During my time with the Bureau, my main responsibilities were on-site inspections of regulated facilities and review of air quality permit applications and draft permits in accordance with local, state, and federal regulations.
- I was responsible for staying current with changes to local regulations, as well as any revisions or newly promulgated federal regulations.
- Additionally, I was responsible for mentoring new enforcement and permitting staff in the Bureau.

ENVIRONMENTAL HEALTH SCIENTIST, Pueblo Office of Environmental Protection, All Indian Pueblo Council: October 2000 – February 2002

- My main responsibility while working with POEP, was site assessment and site inspection of potential Superfund sites.
- Additionally, I was the Health/Safety Officer and Emergency Management Coordinator.

ENVIRONMENTAL/SAFETY SPECIALIST, Philips Semiconductor: May 1998 – October 2000

- While with Philips, my main responsibility was providing emergency response training to Philips emergency response personnel.
- Secondary responsibility was incident record keeping and analysis.

From: mark@abosana.org
To: Merta, Ed L.
Subject: EPA Affirmative Defenses
Date: Thursday, February 11, 2016 2:54:11 PM

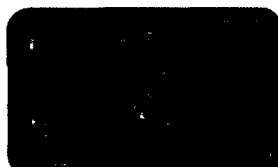
1. Please explain in English (non-legalese) the meaning of "affirmative defenses."
2. What is the cost of removing "affirmative defenses?"
3. What "facilities" are included?
4. What is the scope of "startup, shutdown, and malfunction?"

Thank you,

Mark Burton

President, SANA

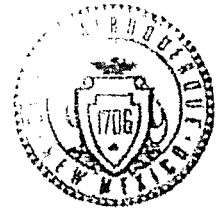
USAF Maj Ret



CITY OF ALBUQUERQUE

Environmental Health Department

Mary Lou Leonard, Director



June 27, 2016

Provided by email to mark@abqsana.org

Dear Mr. Burton:

Thank you for your email of February 11, 2016, posing questions about an upcoming change in an air quality regulation.

The answers to your questions are below. Per your request for English rather than legalese, these answers are as simple and jargon free as possible. However, nothing here should be treated as legal advice or as an exhaustive explanation. In the interest of clarity and simplicity, much complex technical and legal detail has been left out. If you would like to discuss anything below in further detail, feel free to give me a call at (505) 768-2660 or Dario Rocha, Control Strategies Division Manager, at (505) 768-2637.

PO Box 1293

1) Your first question was, "Please explain in English (non-legalese) the meaning of 'affirmative defense.' "

Albuquerque

The term "affirmative defense" is a legal term. A commonly understood affirmative defense to many violations of law is a statute of limitations. Even though someone may have broken a law, that person is not punished because he or she had an affirmative defense, in this case the fact that the statute of limitations ran out.

NM 87103

2) Your second question was, "What is the cost of removing 'affirmative defenses?' "

www.cabq.gov

EHD does not expect that removing affirmative defenses from the air quality regulations will be costly but EHD does not separately track these expenses. In any event, this change is required by federal legal decisions and EHD is required to make the necessary changes to comply.

3) Your third question was, "What 'facilities' are included?"

"Facilities" affected by this change include all stationary air pollution sources (i.e. not vehicles or other mobile sources) in Albuquerque and Bernalillo County. Currently, there are about 800 air permit holders in the city and county area.

4) Your fourth question was, "What is the scope of 'startup, shutdown, and malfunction?"

These three terms are defined in the regulations and are circumstances in which sources more frequently have excess emissions.



Thank you again for your comments. If you have further comments or questions, please contact me at emerta@cabq.gov, (505) 768-2660, or Dario Rocha, Control Strategies Manager, at drocha@cabq.gov, (505) 768-2637.

Sincerely,

Edward J. Merta

Ed Merta
Air Quality Regulation Development Coordinator
Air Quality Program
Environmental Health Department
City of Albuquerque

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*Charles Rennick
**David A. Roman
Lindsay R. Drennan
Taylor S. Rahn
Nick S. Autio
Jordan P. George
Brian S. Colón, *Of Counsel*
Robert M. White, *Of Counsel*

*Also admitted in Texas
**Also admitted in Washington, D.C.

March 2, 2016

Mr. Ed Merta
Air Quality Regulation Development Coordinator
City of Albuquerque Environmental Health Department
Air Quality Program
1 Civic Plaza NW, Room 3023
Albuquerque, New Mexico 87102
emerta@cabq.gov

VIA E-MAIL AND U.S. MAIL

**Re: Comments on the Proposed Revision to the Albuquerque-Bernalillo County
Affirmative Defenses for Excess Emissions**

Dear Mr. Merta:

I appreciate the opportunity to submit the following comments on the City of Albuquerque Environmental Health Department, Air Quality Program's proposed revision to the Albuquerque-Bernalillo County affirmative defenses for excess emissions, on behalf of Western Refining Pipeline, LLC; Western Refining Terminals, LLC; and Western Refining Retail, LLC (collectively referred to herein as "Western Refining"). Western Refining Pipeline, LLC and Western Refining Terminals, LLC operate a pipeline, pipeline office, and petroleum products and asphalt terminals in Albuquerque. Western Refining Retail, LLC operates the Giant convenience stores and associated gas stations.

Introduction

On June 12, 2015, the U.S. Environmental Protection Agency ("EPA") published a call for state implementation plan ("SIP") revisions to New Mexico and other affected states to revise the affirmative defenses for excess emissions that occur during malfunctions, startups and shutdowns, and emergencies.¹ The SIP call seeks revisions to the New Mexico SIP to be submitted by November 22, 2016.² Challenges to the SIP call are pending in the U.S. Court of Appeals for the D.C. Circuit.³

¹ 80 Fed. Reg. 33,840 (June 12, 2015). The New Mexico SIP provisions at issue are N.M. Admin. Code §§ 20.2.7.111-113, which apply statewide, and N.M. Admin. Code §§ 20.11.49.16.A-C, which apply in the Albuquerque-Bernalillo County area.

² *Id.* at 33,848.

³ See *Se. Legal Found., Inc. v. EPA*, No. 15-1166 (D.C. Cir.) (consolidating multiple petitions for review).

In response to the SIP call, the City of Albuquerque Environmental Health Department, Air Quality Program has proposed a revision to the New Mexico SIP that would eliminate the Albuquerque-Bernalillo County affirmative defenses for excess emissions and convert the affirmative defense criteria into penalty assessment factors for consideration by the Air Quality Program in an enforcement action.⁴ The proposed revision would also amend certain other definitions and provisions related to excess emissions generally.⁵

The Air Quality Program should not propose to eliminate the Albuquerque-Bernalillo County affirmative defenses and convert the affirmative defense criteria into penalty assessment factors. Instead, for the reasons identified below, the Air Quality Program should propose to retain the Albuquerque-Bernalillo County affirmative defenses in the New Mexico Administrative Code as locally-enforceable rules, and seek to remove these provisions only from the federally-enforceable New Mexico SIP. Such a revision would ensure compliance with the SIP call, while preserving the availability of the affirmative defenses in the local enforcement context. Moreover, to the extent the Air Quality Program proposes to amend definitions and provisions related to excess emissions generally, it should ensure that the amendments are consistent with any unchanged provisions.

I. The Air Quality Program should propose to retain the Albuquerque-Bernalillo County affirmative defenses as locally-enforceable rules, and seek only to remove these provisions from the federally-enforceable New Mexico SIP.

A. Removal of the affirmative defenses only from the SIP would ensure compliance with the SIP call.

In the preamble to the SIP call, EPA states that “[a] SIP revision to remove affirmative defense provisions will assure that the SIP provision does not purport to alter or eliminate the jurisdiction of federal courts to assess liability or to impose remedies consistent with the statutory authority provided in [Clean Air Act] section 113 and section 304.”⁶ EPA further states that the court decision that prompted the SIP call with respect to affirmative defenses:

did not speak directly to the issue of whether states can establish affirmative defenses to be used by sources exclusively in state administrative enforcement actions or in judicial enforcement in state courts. The reasoning of the . . . court indicates only that such provisions would be inconsistent with the [Clean Air Act] in the context of judicial enforcement of SIP requirements in federal court. Indeed, the . . . court suggested that if the EPA elected to consider

⁴ See “20.11.49 NMAC, Excess Emissions - Stakeholder Review Draft,” City of Albuquerque, Air Quality Control Board (Jan. 27, 2016), available at <https://www.cabq.gov/airquality/air-quality-control-board/documents/20-11-49-nmac-stakeholder-review-draft-1-27-2016.pdf>.

⁵ *Id.*

⁶ 80 Fed. Reg. at 33,847.

factors comparable to the affirmative defense criteria in its own administrative enforcement proceedings, it may be able to do so.⁷

Thus, removal of the Albuquerque-Bernalillo County affirmative defenses only from the New Mexico SIP would ensure compliance with the SIP call. The affirmative defenses would remain in the New Mexico Administrative Code as locally-enforceable rules that would apply only in local administrative enforcement actions or in judicial enforcement actions brought by the Air Quality Program in New Mexico courts. Such “state-only” provisions are viable under EPA’s current affirmative defense policy because:

The EPA of course agrees that states can exercise their own enforcement discretion and elect not to bring an enforcement action or seek certain remedies, using criteria analogous to an affirmative defense. . . . *To the extent that the state developed an “enforcement discretion” type provision that applied only in its own administrative enforcement actions or only with respect to enforcement actions brought by the state in state courts, such a provision may be appropriate.*⁸

In addition, at least one EPA Region has indicated that removing affirmative defense provisions from a SIP, but retaining those provisions in state law, would be consistent with Clean Air Act requirements and EPA’s affirmative defense policy and therefore approvable.⁹

B. Removal of the affirmative defenses only from the SIP would preserve the availability of the affirmative defenses in the local enforcement context.

The Air Quality Program’s proposed revision to the New Mexico SIP would remove the availability of the Albuquerque-Bernalillo County affirmative defenses even in the local enforcement context—an approach which the SIP call does not require. Sources in the Albuquerque-Bernalillo County area rely on the affirmative defenses to address the unavoidable instances of malfunctions, startups and shutdowns, and emergencies that result in excess emissions. The Air Quality Program should therefore propose to retain the affirmative defenses in the New Mexico Administrative Code as locally-enforceable rules, thus preserving their availability in local administrative enforcement actions or in judicial enforcement actions brought by the Air Quality Program in New Mexico courts.

⁷ 80 Fed. Reg. at 33,855 (citing *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)) (emphasis added).

⁸ 80 Fed. Reg. at 33,855 (emphasis added).

⁹ See Letter from Carl Daly, Director, Air Program, EPA Region 8, to William Allison, Director, Air Pollution Control Division, Colorado Department of Public Health (Nov. 12, 2015), available at <https://www.colorado.gov/pacific/sites/default/files/111915-ComPrv-EPA-Docs.pdf> (“A SIP revision following this approach . . . would be more easily approved, subject to completion of our notice and comment process.”).

C. Recommended approach

The Air Quality Program should seek to remove the following Albuquerque-Bernalillo County affirmative defense provisions only from the New Mexico SIP:

- N.M. Admin. Code § 20.11.49.16 (providing affirmative defenses for excess emissions during malfunctions, startups and shutdowns, and emergencies)
- N.M. Admin. Code § 20.11.49.15(B)(15) (requiring a source to report its intent to claim an affirmative defense for excess emissions)
- N.M. Admin. Code § 20.11.49.6 (only the portion stating the objective of establishing affirmative defenses for excess emissions)
- N.M. Admin. Code § 20.11.49.18 (allowing future enforcement action against a source for excess emissions for which an affirmative defense determination has been made)

These provisions should be retained in the New Mexico Administrative Code as locally-enforceable rules in order to preserve their availability in the local enforcement context.

D. The recommended approach is no more stringent than but at least as stringent as required by federal law.

The Albuquerque-Bernalillo County Air Quality Control Board adopted the Albuquerque-Bernalillo County affirmative defenses pursuant to the New Mexico Air Quality Control Act, which requires regulations adopted by the local board to be “no more stringent than but at least as stringent as required by” federal law.¹⁰ At the time of adoption, the affirmative defenses were consistent with the Clean Air Act and EPA’s then-current policy on affirmative defenses.¹¹ As such, EPA approved these provisions into the New Mexico SIP.¹²

EPA has revised its policy on affirmative defenses and now believes that SIP affirmative defense provisions alter the authority of federal courts to find liability or impose remedies under Clean Air Act sections 113 and 304.¹³ However, as described above, EPA acknowledges that “state-only” affirmative defenses would not be inconsistent with the Clean Air Act in the context of judicial

¹⁰ N.M. Stat. Ann. § 74-2-5(C)(1)(a); *see also* N.M. Admin. Code §§ 20.2.7.3 (providing that the statutory authority for the statewide affirmative defenses specifically includes N.M. Stat. Ann. § 74-2-5(C)).

¹¹ *See* 75 Fed. Reg. 5,698 (Feb. 4, 2010) (EPA’s approval of the Albuquerque-Bernalillo County area affirmative defenses as consistent with the Clean Air Act and EPA’s September 20, 1999 policy memorandum “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown”); *see also* 74 Fed. Reg. 46,910 (Sept. 14, 2009) (EPA’s approval of the substantively identical statewide affirmative defenses for the same reason).

¹² 75 Fed. Reg. at 5,698.

¹³ 80 Fed. Reg. at 33,981.

Mr. Ed Merta
March 2, 2016
5 | Page

enforcement of SIP requirements in federal court.¹⁴ Thus, the recommended approach is “no more stringent than but at least as stringent as required by” federal law.¹⁵

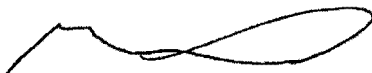
II. To the extent the Air Quality Program proposes to amend definitions and provisions related to excess emissions generally, it should ensure that the amendments are consistent with any unchanged provisions.

The Air Quality Program has also proposed to amend definitions and provisions related to excess emissions generally in N.M. Admin. Code § 20.11.49. Specifically, the department proposes to revise the definitions of “malfunction,” “shutdown,” “startup,” and “stationary source” or “source” (respectively, N.M. Admin. Code § 20.11.49.7(G), (J), (K), and (L)), and to revise the provision governing the operation of a source during periods of excess emissions (N.M. Admin. Code § 20.11.49.14).¹⁶

The Air Quality Program should ensure that these amendments are consistent with any unchanged provisions. For example, the proposed revision to the definition of the “stationary source” or “source” from “any *building, structure, facility, or installation* which emits or may emit a regulated air pollutant” to “a *structure, building, equipment, facility, installation or operation* that emits or may emit an air contaminant” would be inconsistent with the unchanged definition of “*building, structure, facility, or installation*” at N.M. Admin. Code § 20.11.49.7(D).

On behalf of Western Refining, I appreciate your consideration of these comments. Please do not hesitate to contact me if you have questions.

Sincerely,



Marcus J. Rael, Jr.

¹⁴ 80 Fed. Reg. 33,855-86.

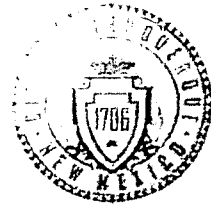
¹⁵ N.M. Stat. Ann. § 74-2-5(C)(1)(a).

¹⁶ See “20.11.49 NMAC, Excess Emissions - Stakeholder Review Draft.”

CITY OF ALBUQUERQUE

Environmental Health Department

Mary Lou Leonard, Director



June 27, 2016

Marcus J. Rael, Jr.
500 Marquette Ave. NW, Suite 700
Albuquerque NM 87102

Dear Mr. Rael:

Thank you for your comments of March 2, 2016 ("Western Refining Letter") on the Environmental Health Department's (EHD) draft amended 20.11.49 NMAC, *Excess Emissions*. Our response follows.

EHD has decided against the "state only" affirmative defense approach proposed by Western Refining. However, EHD agrees with Western Refining's comments regarding potential inconsistencies that may arise if the Part 49 definitions were changed and has deleted those changes from the latest proposed draft Part 49.

PO Box 1293

Albuquerque

NM 87103

www.cabq.gov

The Western Refining Letter suggested withdrawing affirmative defense provisions from 20.11.49 NMAC from the SIP and retaining them unchanged as provisions in a "state only" regulation, outside of the SIP. Western Refining contends that this "would ensure compliance with the SIP call" and that state only affirmative defenses "are viable under EPA's current affirmative defense policy."¹ The Western Refining Letter cited language in EPA's SIP call² as support for this position, along with an EPA Region 8 letter to the State of Colorado.³

EHD agrees that a "state only" affirmative defense regulation would be potentially approvable by EPA. However, EHD has concluded that this approach suffers from a critical disadvantage.

In particular, EPA has informed EHD that state only affirmative defenses would threaten the City / County's federally delegated permitting authority for Title V sources. 40 CFR 70.11(a)(3)(i) provides that a state operating permit program must contain provisions to

¹ Letter from Marcus J. Rael to City of Albuquerque Environmental Health Department on behalf of Western Refining, at 3 (Mar. 2, 2016). (commenting on earlier draft of Proposed Part 49).

² *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy, and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, 80 Fed. Reg. 33,840 at 33,855 to 33,856 (June 12, 2015).

³ Letter from Marcus J. Rael, at 3.



“assess or sue to recover in court civil penalties...for violation of any applicable requirement [among other things].” EPA takes the position that the affirmative defense provisions in the existing language of 20.11.49 NMAC would violate this Title V requirement even if it were a “state only” provision.

Thus, if the Air Board left Part 49 intact and it was only removed from the SIP, this may not resolve the issue about affirmative defenses. EHD might then receive a deficiency notice from EPA about its Title V program. At that point, EHD would have to propose a second rulemaking which would likely propose what EHD is proposing now—to replace affirmative defenses with enforcement discretion. EHD sees no benefit in conducting two rulemakings where one would suffice.

To avoid future issues with its Title V permitting program and bring 20.11.49 NMAC into compliance with all EPA regulations, EHD will pursue the reporting and enforcement discretion approach and not adopt “state only” affirmative defenses.

EHD believes this is the best resolution. EPA has pointed out that there is a high level of public interest in affirmative defenses.⁴ Litigation about affirmative defenses for excess emissions has continued for years.⁵ Retaining state only affirmative defenses only prolongs the legal uncertainty.

Enforcement discretion can achieve the same end result as affirmative defenses have in the past. The owner or operator of the source will have an opportunity to provide information to EHD to show why enforcement discretion is warranted based on the facts. While EHD understands that an owner or operator may prefer an affirmative defense, EHD anticipates that enforcement discretion will lead to similar end results with less long term legal uncertainty.

Finally, the Western Refining Letter pointed out inconsistencies between changes that EHD proposed to some definitions in 20.11.49 NMAC versus language that would remain unchanged in EHD’s proposed draft. After considering this comment, EHD agrees with Western Refining. EHD has therefore decided against amending any of the definitions in 20.11.49 NMAC at this time and will reserve consideration of any necessary amendments to the definitions for a future action.

⁴ 80 Fed. Reg. 33,840 at 33,844 (June 12, 2015).

⁵ See *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014); *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013); *Montana Sulfur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); Settlement Agreement, November 30, 2011, *Sierra Club et al. v. Jackson*, No. 3:10-cv-06060-CRB (N.D. Cal.); *Arizona Public Service Co. v. EPA*, 562 F.3d 1116 (9th Cir. 2009); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008).

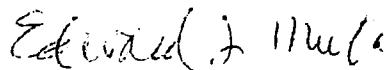
"Startup" refers to a situation where a source activates equipment at a facility and an unexpected amount of air pollution happens, resulting in a violation of limits on that air pollution. "Shutdown" is the opposite of "startup." It's the time when a source turns off machinery and an unexpected air pollution incident happens. Since startup and shutdown happen all the time, it is important that air pollution events associated with these times be carefully investigated to see whether they are truly "unexpected" or whether the source needs maintenance or better engineering.

"Malfunction" refers to a situation where machinery is operating fine one second and then unexpectedly goes awry the next, resulting in a burst of air pollution. When there is a malfunction, there may be a question whether it was truly "unexpected." For example, if an engine's oil was never changed it really wouldn't be "unexpected" for it to break down, possibly with lots of black smoke (air pollution). So, a source that contends that a malfunction was "unexpected," should expect to show that the source was properly maintained, among other things, to avoid enforcement penalties.

The regulation on this subject covers one other special circumstance, besides the ones you asked about, and that is "emergency." This term refers to circumstances where a catastrophic event forces the source to respond immediately in a way that causes air pollution. Here again, specifics of the situation will affect whether enforcement is appropriate and, if so, to what extent.

EHD hopes that these explanations are helpful. If you have further questions, please don't hesitate to call me.

Sincerely,



Ed Merta
Air Quality Regulation Development Coordinator
Air Quality Program
Environmental Health Department
City of Albuquerque
505-768-2660
emerta@cabq.gov

From: Shar, Alan
To: Merta, Ed L.
Cc: Bartlev, Richard; Donaldson, Guy
Subject: preliminary comments on the soon-to-be-proposed rule revisions to 20.11.49 NMAC, Excess Emissions
Date: Thursday, April 14, 2016 7:45:24 AM

Ed – Below please find our preliminary comments on the soon-to-be-proposed rule revisions to 20.11.49 NMAC, Excess Emissions. Comments have been coordinated with Guy and ORC. Thanks.

Alan

Thank you for the opportunity to review the soon-to-be-proposed rule revisions to 20.11.49 NMAC, *Excess Emissions*.

It is our understanding that the City/County intends to adopt an enforcement discretion approach, and do away with the affirmative defense, by revising the existing 20.11.49 NMAC, *Excess Emissions* rule in its current EPA-approved SIP. Please confirm if our understanding of this approach is correct. If so, adoption of an enforcement discretion approach to excess emissions in a SIP is certainly an acceptable response to EPA's SSM SIP call. See 80 Fed. Reg. 33840, 33980-1 (June 12, 2015). As appropriate, the enforcement discretion approach in the proposed 20.11.49 only applies to State enforcement proceedings and is not applicable to EPA enforcement or citizen suits. The EPA believes that such "state-only" provisions should not be included in a SIP. Therefore, we strongly recommend that Albuquerque not submit the Part 49 revisions to EPA for approval as a SIP revision. Instead, Albuquerque would need to submit a request to remove the entire existing 20.11.49 NMAC from the EPA-approved SIP.

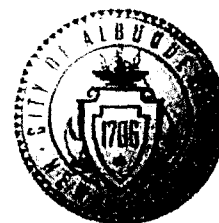
Our specific comments are as follows:

1. We support the idea of maintaining the notification and reporting provisions of the rule, as this information would be useful in helping Albuquerque determine whether to exercise its enforcement discretion. However, we are concerned that the language in soon-to-be proposed 20.11.49.16 NMAC stating that supplemental reports must "show by a preponderance of the evidence that each of the claimed criteria applied" may be confusing and lead some to believe that if the source meets that burden, then the source is entitled to relief. We note that the above-quoted language appears to be more appropriate for an affirmative defense, rather than an enforcement discretion approach, and we would strongly recommend its removal, or be reworded differently.
2. The enforcement discretion provisions should be clear and unequivocal that they apply only to Albuquerque's exercise of enforcement discretion and that information submitted in the supplemental reports addressing the listed criteria may be used to guide the exercise of enforcement discretion by Albuquerque enforcement officials. See 80 Fed. Reg. 33980-81.
3. We support the language in 20.11.49.16 NMAC to the effect that the rule shall not be construed to preclude EPA or federal court jurisdiction under Section 113 of the Act, or to interfere with the rights of citizens under section 304 of the Act.
4. The use of the word "seeking" before the list of actions listed in 20.11.49.16(D)(1) - (4) NMAC appears misplaced. We strongly recommend replacing the word "seeking" with "involving," "concerning," or a similar word. In addition, the current SIP element concerning actions involving excess emissions that cause an exceedance of a NAAQS or PSD increment has been eliminated from the list of actions in the soon-to-be proposed 20.11.49.16(D)(1) - (4) NMAC. We strongly recommend this language be included in the rule, as NAAQS and PSD increments are standards not covered by the term "federally promulgated emission limits" under soon-to-be proposed 20.11.49.16(D)(3).
5. Soon-to-be proposed 20.11.49.16(D)(4) NMAC appears to prohibit consideration by the

department of information in a supplemental report in any enforcement action involving violations of federally promulgated **performance** standards. We interpret this reference to mean 40 CFR Part 60 (New Source **Performance** Standards) requirements only, and so the rule would not extend to actions involving excess emission violations of 40 CFR Parts 61 and 63 (NESHAP or MACT standards) or any other federally promulgated standards or emission limits. We strongly recommend this soon-to-be proposed 20.11.49.16(D) NMAC be revised to include actions involving excess emission violation of 40 CFR Parts 61 and 63 (NESHAP) requirements or any other federally promulgated standard or emission limit, as well.

We appreciate your efforts to address excess emissions and the SSM SIP Call. If you have any questions regarding these comments, please feel free to contact me.

CITY OF ALBUQUERQUE



June 3, 2016

Alan Shar
USEPA Region 6
1445 Ross Ave., Suite 1200
Mail Code: 6MM
Dallas, TX 75202-2733

Re: Response to EPA comments on draft regulation responding to EPA SIP call on
SSM excess emissions

Dear Alan:

Thank you for your comments of April 14 on our pre-rulemaking review draft of a proposed amended 20.11.49 NMAC. We appreciate the time that EPA has taken to provide feedback as we comply with EPA's SIP call.

PO Box 1293

Albuquerque

The remainder of this letter quotes EPA's comments of April 14 and provides EHD's response to each. Changes made in response to EPA comments appear in the revised pre-rulemaking draft of EHD's proposed amended 20.11.49 NMAC, enclosed with this letter.

New Mexico 87103

EPA general comment 1:

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It is our understanding that the City/County intends to adopt an enforcement discretion approach, and do away with the affirmative defense, by revising the existing 20.11.49 NMAC, *Excess Emissions* rule in its current EPA-approved SIP. Please confirm if our understanding of this approach is correct. If so, adoption of an enforcement discretion approach to excess emissions in a SIP is certainly an acceptable response to EPA's SSM SIP call. See 80 Fed. Reg. 33840, 33980-1 (June 12, 2015).

EHD response:

EHD confirms EPA's understanding as described above. The City/County intends to adopt an enforcement discretion approach as outlined in EPA's SSM SIP call and remove affirmative defenses from the text of 20.11.49 NMAC, *Excess Emissions*.

EPA general comment 2:

The EPA believes that such “state-only” provisions should not be included in a SIP. Therefore, we strongly recommend that Albuquerque not submit the Part 49 revisions to EPA for approval as a SIP revision. Instead, Albuquerque would need to submit a request to remove the entire existing 20.11.49 NMAC from the EPA-approved SIP.

EHD response:

EHD accepts EPA’s recommendation. EIID will propose to the Albuquerque – Bernalillo County Air Quality Control Board that the Board adopt EHD’s proposed amended 20.11.49 NMAC as a regulation in effect only under New Mexico law. EHD will also ask that the Board authorize all necessary action to request that EPA remove the entire existing 20.11.49 NMAC from the EPA-approved SIP.

EPA specific comment 1:

We support the idea of maintaining the notification and reporting provisions of the rule, as this information would be useful in helping Albuquerque determine whether to exercise its enforcement discretion. However, we are concerned that the language in soon-to-be proposed 20.11.49.16 NMAC stating that supplemental reports must “show by a preponderance of the evidence that each of the claimed criteria applied” may be confusing and lead some to believe that if the source meets that burden, then the source is entitled to relief. We note that the above-quoted language appears to be more appropriate for an affirmative defense, rather than an enforcement discretion approach, and we would strongly recommend its removal, or be reworded differently.

EHD response:

In response to this comment, EHD has revised its proposed draft to remove from 20.11.49.16 NMAC the phrase “show by a preponderance of the evidence.” EHD has substituted new language, such that the revised sentence now reads: “An owner or operator of a source who contends that enforcement action for an excess emission is not warranted must provide information in a supplemental report as described in Subsections A, B, or C of 20.11.49.16 NMAC.” See the attached revised draft of the regulation, page 4, lines 28-30.

EHD also notes that its draft amended regulation provides, at 20.11.49.16.D NMAC: “Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for an excess emission.” EHD proposes to retain this wording when it moves to the public hearing process. See the attached draft regulation, page 6, lines 33-34. EHD inserted this language into the draft regulation in order to remove any doubt about whether the revised version of the regulation creates an affirmative defense or entitles a source to relief.

EHD believes its revised draft avoids ambiguities about whether any provision in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief automatically if it meets certain criteria.

EPA specific comment 2:

The enforcement discretion provisions should be clear and unequivocal that they apply only to Albuquerque's exercise of enforcement discretion and that information submitted in the supplemental reports addressing the listed criteria may be used to guide the exercise of enforcement discretion by Albuquerque enforcement officials. See 80 Fed. Reg. 33980-81.

EHD response:

EHD intends the enforcement discretion criteria in its draft regulation to apply only to EHD's exercise of enforcement discretion, not to EPA or any other party. To make this intent clearer, EHD will insert into the draft regulation, at 20.11.49.16 NMAC, page 4, lines 33-35, the following sentence: "The information in the supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable in a legal proceeding by any party or to limit the enforcement authority of any party."

EPA specific comment 3:

We support the language in 20.11.49.16 NMAC to the effect that the rule shall not be construed to preclude EPA or federal court jurisdiction under Section 113 of the Act, or to interfere with the rights of citizens under section 304 of the Act.

EHD response:

EHD thanks EPA for this comment.

EPA specific comment 4:

The use of the word "seeking" before the list of actions listed in 20.11.49.16(D)(1) - (4) NMAC appears misplaced. We strongly recommend replacing the word "seeking" with "involving," "concerning," or a similar word. In addition, the current SIP element concerning actions involving excess emissions that cause an exceedance of a NAAQS or PSD increment has been eliminated from the list of actions in the soon-to-be proposed 20.11.49.16(D)(1) - (4) NMAC. We strongly recommend this language be included in the rule, as NAAQS and PSD increments are standards not covered by the term "federally promulgated emission limits" under soon-to-be proposed 20.11.49.16(D)(3).

EHD response:

EHD agrees with this comment. EHD will replace the word “seeking” in the cited provision of its draft regulation with the word “involving.” See the enclosed draft, 20.11.16.D NMAC, page 6, line 38. As recommended by EPA, EHD is also inserting language in the draft of 20.11.16.D NMAC regarding exceedance of a NAAQS or PSD increment. The list of actions in the draft 20.11.16.D NMAC will now include the following: “(3) exceedance of the NAAQS or PSD increments.” See the attached draft, page 6, line 41.

EPA specific comment 5:

Soon-to-be proposed 20.11.49.16(D)(4) NMAC appears to prohibit consideration by the department of information in a supplemental report in any enforcement action involving violations of federally promulgated **performance** standards. We interpret this reference to mean 40 CFR Part 60 (New Source **Performance** Standards) requirements only, and so the rule would not extend to actions involving excess emission violations of 40 CFR Parts 61 and 63 (NESHAP or MACT standards) or any other federally promulgated standards or emission limits. We strongly recommend this soon-to-be proposed 20.11.49.16(D) NMAC be revised to include actions involving excess emission violation of 40 CFR Parts 61 and 63 (NESHAP) requirements or any other federally promulgated standard or emission limit, as well.

EHD response:

To address this comment, EHD will make changes in the language of its proposed draft 20.11.49.16.D NMAC. See the attached draft regulation, page 6, lines 42-45. Following this change, items (4) and (5) in the draft 20.11.49.16.D NMAC now address any violations of requirements in or derived from 40 CFR 60, 61, and 63 or any other federally promulgated emission standard or emission limit.

Please do not hesitate to contact me if you should have questions or further comments in regard to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed Merta".

Ed Merta
Air Quality Regulation Development Coordinator
Environmental Health Department
City of Albuquerque
One Civic Plaza NW, Suite 3023
Albuquerque, NM 87103
(505) 768-2660
emerta@cabq.gov

Enclosure

cc: Dario Rocha, Control Strategies Manager, Environmental Health Department
Danny Nevarez, Deputy Director, Environmental Health Department



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

JUL 07 2016

Ed Mertha
Air Quality Regulation Development Coordinator
Environmental Health Department
City of Albuquerque
P.O. Box 1293
Albuquerque, NM 87103

Dear Mr. Mertha:

Thank you for the opportunity to review and comment on proposed revisions to the excess emissions provisions of the New Mexico State Implementation Plan (SIP) for Albuquerque-Bernalillo County found at 20.11.49 New Mexico Administrative Code (NMAC). It is our understanding that the proposed revisions are in response to EPA's Startup, Shutdown, and Malfunction (SSM) SIP Call. See 80 FR 33840, June 12, 2015. We would also like to acknowledge the Environmental Health Department's (EHD) diligent efforts to address the SSM SIP Call.

Proposed revisions to sections 20.11.49.16(A) – (C) NMAC would remove the current affirmative defense provisions for excess emissions associated with the startup, shutdown, malfunction, or emergency events, and replace them with an enforcement discretion approach when evaluating supplemental reports for excess emissions. The EPA has noted that the use of enforcement discretion by state agency personnel may be an appropriate approach to address excess emissions during SSM events. See 80 FR 33980, June 12, 2015.

As a result of above-described proposed revisions, sections 20.11.49.15(B).15 NMAC; 20.11.49.16(D) NMAC; 20.11.49.16(E) NMAC; 20.11.49.18 NMAC; and a portion of 20.11.49.6 NMAC are rendered inoperative or superfluous. These sections are also proposed to be removed from the existing SIP for Albuquerque-Bernalillo County. Removal of these sections from the SIP is consistent with EPA's findings for Albuquerque-Bernalillo County in the SSM SIP Call. See 80 FR 33968, June 12, 2015.

According to Item 15 of AQCB Petition No. 2016-3, the EHD does not intend to submit the revised version of 20.11.49 NMAC to the EPA as a revision to the SIP for Albuquerque-Bernalillo County. We support this approach and note that "state-only" enforcement discretion related rules do not have to be submitted to the EPA for review and inclusion into the SIP. Therefore, it is our understanding that EHD intends to withdraw the existing 20.11.49 NMAC in its entirety from the SIP, and retain the revised 20.11.49 NMAC in its entirety outside the SIP as a "state-only" rule. We believe it is preferable for "state-only" enforcement discretion rules to be outside the EPA-approved SIP in order to minimize any potential for confusion about the applicability of such provisions.

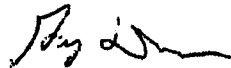
Our specific comments on the proposed revisions are as follows:

1. The submittal letter from your agency should clearly state that the EHD is withdrawing 20.11.49 NMAC from the SIP, and retaining the revised 20.11.49 in its entirety outside of the SIP.

2. Due to the fact that EHD is proposing to remove 20.11.49 NMAC from the New Mexico SIP for Albuquerque-Bernalillo County, a demonstration under Clean Air Act (CAA) section 110(l) is a necessary component of your SIP submittal to the EPA. See 80 FR 33975, June 12, 2015.
3. The EPA is supportive of the statement in 20.11.49.14 NMAC that *"the emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action."* This statement is consistent with EPA's interpretation of the CAA, and its longstanding policy statements concerning excess emissions since 1982.
4. The EPA is supportive of the statement in 20.2.49.16 NMAC that this rule *"shall not be construed to preclude EPA or federal court jurisdiction under section 113 of the federal act to assess civil penalties ..., or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304 of the federal act."* This statement is consistent with sections 113 and 304 of the CAA.
5. The EPA is supportive of adoption of enforcement discretion approach as the June 14, 2016 (81 FR 38645) publication also calls for removal of the affirmative defense provisions for upsets/emergencies found in the regulations for state and federal operating permit programs.

Should you have any questions regarding this letter, please feel free to contact me at (214) 665-7242.

Sincerely,



Guy Donaldson
Chief
Air Planning Section

**ANALYSIS DEMONSTRATING COMPLIANCE WITH REQUIREMENTS OF THE
CLEAN AIR ACT, SECTION 110(I).**

**CITY OF ALBUQUERQUE
ENVIRONMENTAL HEALTH DEPARTMENT**

**To be submitted to the U.S. Environmental Protection Agency (“EPA”) in support of a
proposed revision to Albuquerque – Bernalillo County provisions of the New Mexico State
Implementation Plan**

This non-interference demonstration is submitted in support of a proposed revision to the New Mexico State Implementation Plan (“SIP”), which would remove 20.11.49 NMAC – *Excess Emissions* in its entirety from the SIP (“Proposed SIP Revision”). The Proposed SIP Revision responds to an EPA determination (“SIP Call”) that certain provisions in 20.11.49 NMAC are substantially inadequate to comply with the Clean Air Act. 80 Fed Reg. 33, 840 (June 12, 2015).

Brief description of related state administrative proceedings

As described elsewhere in supporting materials submitted to EPA for this Proposed SIP Revision, the City of Albuquerque Environmental Health Department (“EHD”) petitioned the Albuquerque – Bernalillo County Air Quality Control Board (“Air Board”) on June 27, 2016, proposing a request to EPA to remove 20.11.49 NMAC in its entirety from the SIP and amend the state regulation to remove all provisions related to affirmative defenses, substituting enforcement discretion provisions applicable only to EHD. The Air Board subsequently held a hearing and voted in favor of the actions requested in EHD’s petition. All requirements for this rulemaking under state and local law were met. This Proposed SIP Revision submittal to EPA includes all necessary documentation to show that SIP submittal requirements in 40 CFR Part 51, Appendix V were followed.

Description of the requirements of Section 110(l)

The Clean Air Act, at Section 110(l) prohibits EPA from approving a proposed State Implementation Plan (SIP) revision if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Clean Air Act. Therefore, the EPA has stated that it will approve a SIP revision that removes or modifies control measure(s) in a SIP only after a state submitting a proposed revision has demonstrated that such removal or modification will not interfere with attainment of the National Ambient Air Quality Standards (NAAQS), rates of progress for emission reductions in nonattainment areas, reasonable further progress as defined in state plans for nonattainment areas, or any other applicable requirement of the Clean Air Act.

Specifically, Section 110(l) states:

“Each revision to an implementation plan submitted by a State under this Act shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.”

EPA general guidance issued along with the SIP Call illustrates how a jurisdiction such as Albuquerque – Bernalillo County can demonstrate compliance with conditions imposed by CAA § 110(l). EPA indicates that the jurisdiction need not submit a “complicated analysis”

involving quantitative supporting evidence. 80 Fed. Reg. 33,975 (June 12, 2015). After examining this general guidance and consulting with EPA Region 6, it is EHD's understanding that a jurisdiction can demonstrate compliance with Section 110(l) by providing evidence showing that the Proposed SIP Revision:

(1) removes existing affirmative defense provisions from the SIP provision at issue;

(2) substitutes criteria that a state air agency may or may not apply in exercising its own enforcement discretion, without applying to enforcement action by other parties;

(3) does not alter any other substantive aspects of the SIP provision at issue;

(4) does not alter any emission limitations applied to sources.

Based on the above guidance and on consultation with EPA Region 6, it is EHD's understanding that, rather than a quantitative demonstration of predicted emission levels or ambient air quality, a demonstration in response to the SIP Call intended to show compliance with the requirements of Section 110(l) should provide a qualitative analysis of the four factors enumerated above.

That qualitative analysis appears below. It examines the four factors enumerated above as they apply to a 20.11.49 NMAC that has been removed from the New Mexico SIP and, further, amended as a state only regulation so that affirmative defense provisions are replaced with criteria guiding EHD's exercise of enforcement discretion criteria applicable only to EHD and not to enforcement actions by any other party.

The Proposed SIP Revision would remove affirmative defenses from the SIP

As shown in the supporting materials for the Proposed SIP Revision (including hearing testimony, the Statement of Reasons adopted by the Air Board, and the amended 20.11.49 NMAC that will be filed with the State Records Center and Archives), EHD is requesting that EPA remove 20.11.49 NMAC in its entirety from the SIP.

EHD further notes that, consistent with the SIP Call, the state regulation adopted by the Air Board removes affirmative defense provisions from the regulation at 20.11.49(A), (B), and (C) NMAC, along with certain other related provisions elsewhere in the regulation. The provisions identified in the SIP Call as substantially inadequate under the Clean Air Act would be removed from the SIP following EPA approval of the removal.

The amended 20.11.49 NMAC effective under state law replaces affirmative defense provisions with state-only enforcement criteria

As shown in supporting materials for the Proposed SIP Revision (including hearing testimony, the Statement of Reasons adopted by the Air Board, and the amended 20.11.49 NMAC that will be filed with the State Records Center and Archives), the amended 20.11.49 NMAC will be effective as state law only and includes no affirmative defense provisions. They have been entirely removed from the regulation, replaced with language based on EHD's exercise of enforcement discretion regarding excess emissions episodes on a case by case basis. This language has been drafted in accordance with EPA policy described in the SIP Call, in EPA Guidance documents, and in consultations with EPA Region 6. The provisions in the regulation regarding exercise of enforcement discretion apply only to EHD, not to any other party, including EPA, federal courts, or persons bringing an enforcement action under the citizen suit provision of the Clean Air Act.

Specific features of the amended 20.11.49 NMAC that comply with EPA policy and with recommendations from EPA Region 6 regarding compliance with Section 110(l) include:

- language at 20.11.49.14 NMAC stating that “emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action.”
- provisions in 20.11.49.15 NMAC and 20.11.49.16 NMAC requiring that a source owner or operator’s notification and supplemental reporting of excess emissions episodes must, among other things, document proper air pollution control management methods to facilitate EHD’s evaluation of potential enforcement actions;
- language at 20.11.49.16 NMAC stating that the rule “shall not be construed to preclude EPA or federal court jurisdiction under section 113 [of the Clean Air Act] to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA or the courts from considering the statutory factors for the assessment of civil penalties under section 113 [of the Act], or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304 [of the Act].”

The Proposed SIP Revision would not alter any substantive aspect of 20.11.49 NMAC other than the provisions in the SIP related to affirmative defenses

As shown in the supporting materials for the Proposed SIP Revision (including hearing testimony, the Statement of Reasons adopted by the Air Board, and the amended 20.11.49 NMAC that will be filed with the State Records Center and Archives), the amendments to 20.11.49 NMAC do not amend substantive provisions in the regulation other than those that must

be amended to replace affirmative defenses provisions with enforcement discretion criteria in accordance with EPA policy and guidance. Certain other minor changes to clarify the language of the regulation would not alter substantive provisions related to the SIP Call.

The Proposed SIP Revision would not alter any emission limitations applicable to any regulated source

As shown in the supporting materials for the Proposed SIP Revision (including hearing testimony, the Statement of Reasons adopted by the Air Board, and the amended 20.11.49 NMAC that will be filed with the State Records Center and Archives), emission reductions applicable to regulated air pollutant sources in Albuquerque and Bernalillo County are not affected under the amended 20.11.49 NMAC. Rather, the changes in the regulation merely alter certain aspects of the process by which EHD approaches enforcement actions in the event of excess emissions related to startup, shutdown, and malfunction.

Because emission limitations will not change under the amended regulation, EHD does not anticipate that the amendments will cause an increase in the amount of emissions or the number of excess emission episodes.

Conclusion

In light of the information presented above and in the rest of the supporting materials for this Proposed SIP Revision, EHD has determined that the National Ambient Air Quality Standards will continue to be maintained and there will be no interference with rates of progress, reasonable further progress, or any other requirement of the Clean Air Act.

**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF PETITION TO AMEND
20.11.49 NMAC- *EXCESS EMISSIONS***

AQCB Petition No.2016-3

**Environmental Health Department,
City of Albuquerque, Petitioner**

**ENVIRONMENTAL HEALTH DEPARTMENT'S
PROPOSED ORDER AND STATEMENT OF REASONS
FOR ADOPTING AMENDMENTS TO
20.11.49 NMAC, *EXCESS EMISSIONS***

This matter comes before the Albuquerque – Bernalillo County Air Quality Control Board (“Air Board”) upon a Petition filed by the City of Albuquerque Environmental Health Department (“EHD”), proposing amendments to 20.11.49 NMAC – *Excess Emissions* (“EHD’s Proposed Rule”) and a request to the U.S. Environmental Protection Agency (“EPA”) to withdraw the regulation in its entirety from the State Implementation Plan (“SIP”).

A public hearing was held in Albuquerque on September 14, 2016, with a quorum of the Air Board present during the hearing. Following the hearing, the Air Board deliberated and voted to adopt the proposed amendments for the reasons that follow:

Findings of Fact

1. 20.11.49 NMAC – *Excess Emissions*, creates processes for addressing excess emissions by stationary sources. An excess emission is an unexpected emission of a regulated air pollutant from a stationary source that violates an emission limit in a permit or regulation. Reyes Testimony, page 2; Rocha Testimony, pages 1-2.
2. Among other provisions, the currently effective 20.11.49 NMAC in effect prior to this rulemaking allowed an owner or operator of a stationary source (“Permittee”) to claim an affirmative defense for excess emissions that occur during startup, shutdown, malfunction, and

emergency. An affirmative defense claim under 20.11.49 NMAC requires a Permittee to describe extenuating circumstances of an excess emission that, in the Permittee's view, make the excess emission unpreventable and relief from civil penalties thus warranted. EHD would evaluate such claims to determine whether they had sufficient factual support. If they did, relief from penalties would be granted. If they did not, penalties could be assessed and the Permittee could appeal EHD's decision to the Court of Appeals. Reyes Testimony, pages 4-5.

3. On May 22, 2015, EPA issued a determination ("SIP Call") that excess emissions SIP provisions for 36 states, including provisions for Albuquerque and Bernalillo County, New Mexico, were "substantially inadequate" to comply with the federal Clean Air Act. The SIP Call imposed a deadline of November 22, 2016 for affected jurisdictions to send an appropriate proposed SIP revision to EPA for approval. Rocha Testimony, pages 2-3, 5-6.

4. The SIP Call cited specific provisions within 20.11.49 NMAC that EPA concluded were substantially inadequate under the Clean Air Act because they unlawfully impeded the discretion of federal courts to assess penalties under Sections 113 and 304 of the Act. The impermissible provisions in 20.11.49 NMAC related to affirmative defenses for excess emissions during startup, shutdown, malfunction, and emergency. The SIP Call stated that removal of these specific provisions would comply with the SIP Call requirement to submit an appropriate proposed SIP revision in response. Rocha Testimony, pages 3-5.

5. The SIP Call provided guidance on two alternative regulatory approaches for excess emissions that could potentially avoid conflict with the Clean Air Act. One approach was to formulate alternative emission limitations in a SIP regulation that would specifically address excess emissions in a particular source category. EHD testimony at the hearing demonstrated that adopting this approach was problematic due to the severe technical and logistical burdens it

would impose. Rocha Testimony, Pages 6 to 7.

6. The other EPA recommended approach relied on the enforcement discretion of a state or local air agency to address individual episodes of excess emissions on a case by case basis. The SIP Call recommended specific criteria that could guide the exercise of such discretion under the “enforcement discretion approach.” Rocha Testimony, pages 6-9.

7. On June 27, 2016, EHD petitioned the Air Board (“Petition”) for a rulemaking to amend 20.11.49 NMAC and respond to the SIP Call by, among other things, removing language providing affirmative defenses for excess emissions. A public review draft of EHD’s Proposed Rule was attached to the Petition.

8. In accordance with the state Air Quality Control Act (“Air Act”), NMSA 1978 § 74-2-6(C), Revised Ordinances of Albuquerque (“ROA”) § 9-5-1-6(C), Bernalillo County Ordinances 30-35(c), 20.11.82.19 NMAC, and other state law, a notice of public hearing to consider EHD’s Proposed Rule was properly published on July 29, 2016, in the New Mexico Register and in the Albuquerque Journal on the same day. All requirements for notice of this hearing were satisfied.

9. Both the Petition and hearing notice were emailed to persons known to be interested in Air Board rulemaking proceedings or in the EPA SIP Call in particular. The Petition was emailed on June 27, 2016, the day the Petition was filed. The hearing notice was emailed on July 29, 2016, the day notice was published in the New Mexico Register and Albuquerque Journal.

10. The public hearing on EHD’s Proposed Rule was held in Albuquerque, New Mexico on September 14, 2016. The hearing was held in accordance with procedures in 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*.

11. EHD testimony at the hearing showed that EHD's Proposed Rule was drafted in close consultation with EPA Region 6 to be consistent with the "enforcement discretion approach" described in EPA's SIP Call. EPA has stated that the resulting draft of EHD's Proposed Rule attached to EHD's Petition appears to meet all the SIP Call requirements. It does so by proposing amendments to the language of 20.11.49 NMAC removing all provisions related to affirmative defenses, and substituting provisions relying on the exercise of EHD's enforcement discretion to address excess emissions episodes on a case by case basis. Rocha Testimony, pages 9-10.

12. EHD's Proposed Rule replaces affirmative defense language in 20.11.49 NMAC with language allowing a Permittee to file a "supplemental report" describing the circumstances of an excess emission occurring during startup, shutdown, malfunction, or emergency. A supplemental report on an excess emission, like a claim for an affirmative defense, requires the Permittee to present facts demonstrating that the excess emission wasn't reasonably preventable and thus wasn't the Permittee's fault. As with a claim for an affirmative defense, a supplemental report allows the Permittee to ask for relief from civil penalties. As with a claim for an affirmative defense, EHD will evaluate the supplemental report to determine if the facts presented are sufficient to warrant relief from penalties. The Permittee may appeal EHD's decision to the Court of Appeals, as was the case with an affirmative defense. Reyes Testimony, pages 6-9.

13. EHD's testimony showed that enforcement processes under EHD's Proposed Rule can lead to a similar end result to what has occurred in the past using affirmative defenses for excess emissions due to startup, shutdown, malfunction, or emergency. The process for filing a supplemental report will be similar to the one for claiming an affirmative defense, requiring

demonstration of essentially the same facts to warrant relief from civil penalties. EHD will approach enforcement decisions under the amended 20.11.49 NMAC as it did under the prior version. If an excess emission was truly unpreventable, EHD anticipates using its enforcement discretion to relieve a Permittee from penalties for it. Reyes Testimony, pages 8-9.

14. EHD's testimony showed that EHD's Proposed Rule makes certain other advisable minor changes to the language of 20.11.49 NMAC, not required by the SIP Call, for clarity and consistency. In consultations with EHD, EPA had no objection to these changes. Rocha Testimony, pages 11-12.

15. EHD's testimony showed that removal of the entire 20.11.49 NMAC from the SIP, at the recommendation of EPA Region 6, is advisable because the Clean Air Act contains no requirement for states to have a regulation addressing enforcement provisions for excess emissions. Rocha Testimony, page 10.

16. EHD's testimony showed that EHD's Proposed Rule and withdrawal of 20.11.49 NMAC from the SIP will maintain air quality and meet all other Clean Air Act requirements, as required by Section 110(l) of the Act Rocha Testimony, page 11.

17. One stakeholder, Western Refining, submitted pre-rulemaking comments to EHD advocating retention of affirmative defense language in 20.11.49 NMAC and withdrawal of such language from the SIP. Rocha Testimony, page 13.

18. EHD's testimony reported EPA's position that the Western Refining approach is potentially approvable by the EPA as a response to the SIP Call. Rocha Testimony, page 14.

19. However, EHD testimony showed that adopting the Western Refining approach over EHD's Proposed Rule is not advisable. According to EPA Region 6, the Western Refining approach would leave 20.11.49 NMAC in violation of an EPA regulation regarding operating

permit programs required under Title V of the Clean Air Act, which apply primarily to large air pollutant sources. The EPA regulation in question, 40 CFR § 70.11(a)(3), requires an air agency to retain sufficient authority under state law to recover civil penalties in a judicial enforcement action. EPA Region 6 informed EHD that affirmative defense provisions in 20.11.49 NMAC, even as a state (or local) only rule, would violate the above EPA requirement by limiting or restricting EHD's ability to recover civil penalties in court if a source could establish the necessary factual criteria. EPA stated that EHD might face a future EPA notice of deficiency in its Title V operating permit program for large sources if 20.11.49 NMAC retained affirmative defense language as a state only regulation. In that event, a new rulemaking to amend 20.11.49 NMAC would be necessary to avoid an EPA takeover of Title V permitting authority in Albuquerque and Bernalillo County. Rocha Testimony, pages 14-15.

20. All persons present at the hearing were given an opportunity to make a statement regarding the proposed amendments and to cross-examine all witnesses. _____ members of the public appeared at the public hearing and asked questions following EHD's introduction of its testimony. _____ members of the public made oral comments on EHD's Proposed Rule. _____ written comments presented at the hearing were received by the hearing clerk. _____ written comments from the public were received prior to the hearing.

21. All testimony at the hearing was taken under oath. A court reporter prepared a transcript of the proceeding.

22. The hearing record _____ (was or was not) left open after the hearing.

23. Following the hearing, the Air Board deliberated and voted on _____ (date) to adopt the proposed amendments by a vote of _____.

Conclusions of Law

1. The Air Board is authorized to “adopt, promulgate, publish, amend and repeal regulations” consistent with the Air Act and “adopt a plan for the regulation, control, prevention, or abatement of air pollution[.]” NMSA 1978 § 74-2-5(B)(1) and (B)(2) (“Air Act”). In adopting regulations, the Air Board “shall give weight it deems appropriate to all facts and circumstances,” including but not limited to those enumerated in the Air Act. NMSA 1978 § 74-2-5(E).

2. City and County Ordinances authorize the Air Board, in accordance with the Air Act, to adopt regulations and plans within Albuquerque and Bernalillo County addressing facts and circumstances the Air Board deems appropriate. ROA § 9-5-1-4(A), (B) and (C); Bernalillo County Ordinances 30-33(a), (b) and (c).

3. The presence of affirmative defenses in a SIP violates Sections 113 and 304 of the Clean Air Act. Therefore, 20.11.49 NMAC, including its affirmative defense provisions, must be removed from the Albuquerque-Bernalillo County portion of the New Mexico SIP.

4. Affirmative defense provisions in 20.11.49 NMAC, even when effective only as a state or local only regulation, violate EPA Title V regulations at 40 CFR § 70.11(a)(3). Therefore, affirmative defense provisions must be removed from the language of the regulation, over and above removal of the regulation itself from the SIP.

5. The actions requested in EHD’s Petition and Technical Testimony are consistent with all requirements of the Clean Air Act, including those addressed in the EPA SIP Call, Sections 113 and 304 of the Clean Air Act, and in EPA’s regulations governing state and local Title V operating permit programs, 40 CFR § 70.11(a)(3). The EHD actions that the Air Board concludes are consistent with the foregoing federal laws include removal of 20.11.49 NMAC in

its entirety from the SIP, amending the regulation under state law to remove all affirmative defense provisions, and substituting enforcement discretion provisions to address excess emissions episodes.

6. Enforcement processes for Permittees under the amended 20.11.49 NMAC would allow such processes to reach a similar end result to those obtained under affirmative defenses. Permittees would continue to be able to request relief from civil penalties for excess emissions, to be granted such relief when circumstances warranted, and to appeal EHD's assessment of penalties to the Court of Appeals.

7. Unlike the actions requested in EHD's Petition, the alternative of removing 20.11.49 NMAC only from the SIP, while retaining affirmative defenses in a regulation effective only under state (and local) law, would leave 20.11.49 NMAC in violation of federal law regarding requirements at 40 CFR § 70.11(a)(3) for state and local Title V operating permit programs.

8. In light of the foregoing, this rulemaking action is within the Air Board's legal authority and addresses all appropriate facts and circumstances. NMSA 1978, § 74-2-4(E); ROA §9-5-1-4(C); and Bernalillo County Ordinances, § 30-33(C).

Order

1. It is hereby ordered that the proposed regulatory change attached to EHD's Petition filed June 27, 2016 is adopted with any non-substantive modifications necessary for filing with the State Records Center and Archives.

2. The amended 20.11.49 NMAC shall become effective 30 days after filing with the State Records Center and Archives. NMSA 1978 § 74-2-6(F).

3. Upon the amended 20.11.49 NMAC being filed with the State Records Center and Archives and published in the New Mexico Register as required by NMSA 1978 § 14-4-1 et seq., it is hereby ordered that EHD prepare and send a proposed SIP revision to EPA consistent with the requirements in 40 CFR Part 51, Appendix V, requesting that EPA remove 20.11.49 NMAC in its entirety from the SIP.

ISSUED this _____ day of September, 2016

Jane Cudney-Black
Chair, Albuquerque – Bernalillo County Air Quality Control Board

**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF
THE PETITION TO AMEND
20.11.49 NMAC, EXCESS EMISSIONS**

**Environmental Health Department
City of Albuquerque, Petitioner.**

AQCB Petition No. 2016-3

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**ENVIRONMENTAL HEALTH DEPARTMENT'S
LEGAL BRIEF IN SUPPORT
OF PETITION TO AMEND 20.11.49 NMAC**

The City of Albuquerque Environmental Health Department (“EHD”) petitions the Albuquerque – Bernalillo County Air Quality Control Board (“Air Board”) to amend 20.11.49 NMAC, Excess Emissions (“Part 49”) and to authorize a request to the U.S. Environmental Protection Agency (“EPA”) to remove Part 49 from the State Implementation Plan (“SIP”). EHD’s proposal responds to a determination by the EPA that Part 49’s affirmative defense provisions do not comply with the federal Clean Air Act (“SIP Call”). As explained below, by removing the affirmative defense provisions from Part 49, EHD’s proposal ensures compliance with federal and state law and avoids the need to hold a second rulemaking hearing in the near future.

I. INTRODUCTION

Black’s Law Dictionary defines “affirmative defense” as “a defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.” *Black’s Law Dictionary* (10th ed. 2014). The classic example of an affirmative defense is a statute of limitations which bars a legal claim after a

certain amount of time has passed. If the defendant can prove that the applicable statute of limitations has lapsed, it is entitled to dismissal of the alleged violation, regardless of its culpability or the consequences of the violation.

Under the current version of Part 49, an owner or operator of a stationary source (“Permittee”) may claim an affirmative defense for certain types of “excess emissions,” which are defined as emissions that exceed an emission limit in a permit or regulation, 20.11.49.7(F) NMAC, that were allegedly caused by the startup, shutdown, or malfunction of equipment or an emergency. 20.11.49.16 NMAC. A Permittee who proves that the excess emission was not reasonably preventable for one of these reasons cannot be assessed a civil penalty in an administrative or judicial enforcement action.

The D.C. Circuit Court of Appeals has held that affirmative defenses for excess emissions violate the Clean Air Act because they limit the authority and discretion of the federal courts to assess penalties under Sections 113 and 304 of the Clean Air Act. In response, the EPA has determined that Part 49's affirmative defense provisions (as well as similar provisions in the regulations of more than 30 states and local authorities) violate the Clean Air Act, and ordered the City of Albuquerque and Bernalillo County (and the other jurisdictions) to remove them from their respective SIPs. Additionally, these affirmative defense provisions violate Title V of the Clean Air Act even if they were retained in a locally-effective regulation outside the SIP, because they interfere with EHD's authority to assess and recover penalties in administrative and judicial enforcement actions. EHD's proposal substitutes the concept of enforcement discretion for these affirmative defense provisions, both resolving these conflicts and ensuring that Permittees are able to present exculpatory information that could reduce their liability for penalties.

II. AFFIRMATIVE DEFENSES VIOLATE THE CLEAN AIR ACT.

Although the EPA long believed that affirmative defenses were permissible under the Clean Air Act and allowed states and local authorities to adopt them in their SIPs, in 2014 the D.C. Circuit Court of Appeals disagreed, and in response, the EPA has moved to restrict their use.¹ In *Natural Resources Defense Council v. EPA*, the D.C. Circuit held that affirmative defenses in an EPA regulation violated the Clean Air Act. 749 F.3d 1055 (D.C. Cir. 2014). The case addressed an EPA regulation which provided an affirmative defense for malfunctions that caused the violation of emission limits under Section 112 of the Clean Air Act. The affirmative defense applied to both administrative enforcement actions by the EPA and judicial enforcement actions by citizens in federal court. The Court held that the regulation impermissibly limited the court's authority and discretion to impose civil penalties. *Id.* at 1063 ("By its terms, Section 304(a) clearly vests authority over private suits in the courts, not EPA. As the language of the

¹ While the EPA and the federal courts have consistently rejected automatic exemptions for excess emissions during startup, shutdown, or malfunction as violating the Clean Air Act, 80 Fed. Reg. 33,843, 33,849-50 (June 12, 2015); *Mich. Dep't of Envtl. Quality v. Browner*, 230 F.3d 181 (6th Cir. 2000); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008); *Arizona Public Service Co. v. EPA*, 562 F.3d 1116 (10th Cir. 2009), the legality of affirmative defenses has been a frequent subject of litigation. *Sierra Club et al. v. Jackson*, No. 3:10-cv-04060-CRB (N.D. Cal. 2011); *Arizona Public Service Co. v. EPA*, 562 F.3d 1116 (10th Cir. 2010); *Montana Sulfur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013). However, because the Clean Air Act vests the D.C. Circuit with the authority to make decisions regarding the legality of nationally applicable regulations, its decision is the binding interpretation of the Clean Air Act. 42 U.S.C. § 307(b); 80 Fed. Reg. 33,853 (June 12, 2015).

statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are appropriate.”) (internal quotations omitted). Upon remand, the EPA concluded that any affirmative defense provision for excess emissions in a SIP violates the Clean Air Act. 80 Fed. Reg. 33,851 (June 12, 2015).

The EPA's changing approach to excess emissions is reflected in its response to the Air Board's regulations. Beginning in 1971, the Air Board's regulations allowed an automatic exemption for excess emissions. In 1981, the EPA notified the City of Albuquerque that the automatic exemption violated the Clean Air Act. Exhibit 1. However, the EPA took no action to enforce its decision. In 2009, the Air Board adopted EHD's proposal to substitute affirmative defenses for the automatic exemption. Exhibit 2. In 2010, the EPA approved these affirmative defenses in the current Part 49. 75 Fed. Reg. 5,698 (February 4, 2010). In 2014, the D.C. Circuit's decision in *NRDC v. EPA* prompted the EPA's SIP Call. On the other hand, the EPA has consistently stated that authorized jurisdictions may exercise enforcement discretion to address excess emissions, and this position has not been challenged under the Clean Air Act.

III. EHD'S PROPOSAL COMPLIES WITH THE EPA'S SIP CALL.

EHD's proposal addresses the legal deficiencies in Part 49 identified by the EPA's SIP Call. Specifically, the SIP Call determined that Part 49's affirmative defense provisions for startup, shutdown, malfunction, and emergency (20.11.49.16.A, B, and C NMAC), along with other related provisions, do not comply with the Clean Air Act. 80 Fed. Reg. 33,968 (June 12, 2015). The EPA recommended that the Air Board withdraw these provisions from the SIP, and substitute a provision for enforcement discretion to address excess emissions on a case-by-case basis. *Id.* at 33,968, 33,980-81. The SIP Call recognized that an enforcement discretion provision could be contained in a regulation within the SIP or in a locally-effective regulation

outside of the SIP. *Id.* at 33,855-56, 33,871, 33,980-81. However, the EPA cautioned that even if such a provision were contained in a locally-effective regulation outside of the SIP, it could not shield a Permittee from liability for a civil penalty upon a showing of certain facts, citing Section 110(a)(2)(C) (the authorized jurisdiction must maintain sufficient authority to enforce federal requirements). *Id.* at 33,855-56, 33,871.

EHD's proposal satisfies the EPA's SIP Call. Removing the affirmative defense provisions from the SIP remedies the violation of Sections 113 and 304 of the Clean Air Act. Substituting the enforcement discretion provision in a locally-effective regulation outside the SIP, and adding language expressly stating that this provision does not establish an affirmative defense or shield a Permittee from liability for a civil penalty upon a showing of certain facts, ensures compliance with Section 110(a)(2)(C) of the Clean Air Act. Although two commenters suggested that the affirmative defense provisions could be retained in a locally-effective regulation outside of the SIP, EHD disagrees because, as explained below, they present a potential legal issue under another provision of the Clean Air Act, as well as the New Mexico Air Quality Control Act ("State Act").

IV. EHD'S PROPOSAL ENSURES COMPLIANCE WITH THE EPA'S TITLE V PERMIT REGULATIONS.

In addition to the legal deficiencies identified earlier, the affirmative defense provisions in Part 49 conflict with the federal requirements for Title V permits. As a result, if those provisions were not removed from Part 49, even if Part 49 were retained only as a locally-effective regulation outside the SIP, they would violate EPA regulations governing state and local Title V permitting programs.

Title V of the Clean Air Act requires authorized jurisdictions such as the City of Albuquerque and Bernalillo County to manage a permitting program for "major sources." Major sources have the potential to emit more than 100 tons per year of a regulated air pollutant such as carbon monoxide, oxides of nitrogen, and particulate matter, or 10 tons per year of a single hazardous air pollutant or 25 tons per year of combined hazardous air pollutants. 42 U.S.C. §§ 7661-7661f. The Air Board has adopted regulations to implement a Title V permit program in the City of Albuquerque and Bernalillo County. 20.11.42 NMAC, Operating Permits.

EPA's Title V regulations obligate authorized jurisdictions to retain the unfettered ability to enforce the permitting program. In particular, 40 CFR § 70.11(a)(3)(i) states:

Any agency administering a program shall have the following enforcement authority to address violations of program requirements by Part 70 sources...

To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, according to the following: (i) civil penalties shall be recoverable for the violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities or, any regulation or orders issued by the permitting authority. These penalties shall be recoverable in a maximum amount of not less than \$10,000 per day per violation.

EPA has notified EHD that Part 49's affirmative defense provisions would violate this regulation, if they were retained in a locally-effective regulation outside the SIP.

Telephone Conversation of Carol Parker, Assistant City Attorney, City of Albuquerque, and Ed Merta, Air Quality Regulation Development Coordinator, City of Albuquerque, Environmental Health Department, with Rick Bartley, EPA Region 6 Office of Regional Counsel (March 31, 2016). The regulation requires that authorized jurisdictions must have the "authority" to recover civil penalties "in court." Part 49's affirmative defense

provisions limit EHD's authority to recover a civil penalty in court because a major source could not be held liable for a civil penalty if it proved the facts for the affirmative defense. For this reason, EPA told EHD that it would be subject to a notice of deficiency for the Title V permitting program if the Air Board were to retain Part 49's affirmative defense provisions in a locally effective regulation outside the SIP, citing 42 U.S.C. § 7661a(i)(1).² A notice of deficiency would require the Air Board to conduct a second hearing to amend Part 49 or risk federal sanctions, including EPA's takeover of the Title V permit program in Albuquerque and Bernalillo County. 42 U.S.C. §§ 7661a(i)(2), (3) & (4). Although the Air Board's Title V regulations are not directly at issue in this hearing, EHD's proposal averts a second hearing and the attendant costs for both EHD and the Air Board.

V. EHD'S PROPOSAL ENSURES COMPLIANCE WITH THE STATE ACT.

Affirmative defense provisions in a locally-effective regulation outside the SIP also may violate the State Act. Like the Clean Air Act, the State Act assigns the courts sole discretion to assess penalties in a judicial enforcement action. NMSA 1978 74-2-12.1 (authorizing a court to assess civil penalties of up to \$15,000 per day for violating a permit, regulation, or emergency order and up to \$25,000 per day for failing to comply with an administrative order). Like the Clean Air Act, the State Act contains no language allowing the Air Board to limit the court's

² EPA recently proposed to codify this position in its Title V regulations. 80 Fed. Reg. 38,645 (June 14, 2016) (requiring authorized jurisdictions to remove all affirmative defenses from their Title V regulations.)

authority in this way. However, an affirmative defense in a regulation adopted by the Air Board, regardless of whether the regulation is part of the SIP or outside of the SIP, would excuse a source from civil penalties if it could prove certain facts, thereby limiting the court's authority to assess penalties.

VI. EHD'S PROPOSAL DOES NOT VIOLATE THE STRINGENCY PROVISIONS IN THE STATE ACT.

EHD's proposal does not violate the stringency provisions in the State Act because those provisions are not applicable to Part 49. The State Act prohibits the Air Board from adopting a regulation that is more stringent than a federal requirement or standard in five specific areas: (1) visibility on certain types of federal land; (2) Prevention of Significant Deterioration; (3) achievement of National Ambient Air Quality Standards in nonattainment areas; (4) performance standards for certain sources; and (5) emission standards for hazardous air pollutants. NMSA 1978 § 74-2-5(C)(1) and (2). EHD's proposal does not affect any of these requirements or standards, but rather conforms its enforcement process to federal law.

VII. PENDING LITIGATION DOES NOT OBVIATE THE AIR BOARD'S OBLIGATION TO COMPLY WITH THE EPA' SIP CALL.

During EHD's presentation of the Petition on July 8, 2016, the Air Board asked whether EHD's proposal could be affected by current litigation challenging the legality of the EPA's SIP Call. The pending litigation does not allow Albuquerque and Bernalillo County to postpone their compliance with the EPA's SIP Call.

Albuquerque and Bernalillo County are legally required to submit a proposed SIP revision meeting the EPA's requirements no later than the SIP Call deadline of November 22, 2016. 42 U.S.C. § 7410(k)(5). This remains true in spite of any litigation challenging the SIP Call's legality because neither the EPA nor any federal court has vacated or stayed the SIP Call,

nor otherwise relieved the affected jurisdictions of their obligation to comply with the SIP Call.³ Moreover, it is impossible to predict the timing or outcome of a decision in the pending litigation, or EPA's response to the court's decision when it is eventually issued. Absent a stay, Albuquerque and Bernalillo County would be subject to federal sanctions for their failure to timely respond to the SIP Call.⁴ Stated differently, while the outcome of pending litigation is uncertain, the requirement to comply with existing federal law and the penalties for failing to do so are certain.

³ For example, when the U.S. Supreme Court stayed the EPA's greenhouse gas emission standards for existing electric power plants, the authorized jurisdictions, including EHD, were relieved of their obligation to comply with the EPA's deadlines pending the resolution of litigation. *West Virginia v. EPA*, Order Granting Stay, Order List: 577 U.S., 15A793 (February 9, 2016). By contrast, no stay has been issued for the EPA's SIP call, and thus, EHD must comply with the EPA's deadline for submitting a satisfactory response.

⁴ The Clean Air Act requires EPA to impose sanctions on a state, or jurisdiction within a state, whose SIP violates the Clean Air Act or who fails to respond to a SIP Call. 42 U.S.C. § 7509(a). These sanctions include the denial of federal highway funding, the withholding of EPA grants to state and local air quality agencies, and increased emission offsets for new sources in nonattainment areas. 42 U.S.C. § 7509(a) and (b). In fact, the EPA previously imposed such sanctions on Albuquerque and Bernalillo County. In the 1980s, the EPA withheld federal funds from the Air Board, prohibited the construction of major stationary sources that could emit carbon monoxide in Bernalillo County, and barred the approval of some transportation projects and grants requiring federal approval, because the Air Board had failed to submit an approvable SIP to attain the National Ambient Air Quality Standard for carbon monoxide in Albuquerque and Bernalillo County. 50 Fed. Reg. 8,620 (March 5, 1985). These sanctions were upheld by the federal appeals court. *N.M. Env'tl. Improvement Div. v. Thomas*, 789 F.2d 825 (10th Cir. 1986).

VIII. CONCLUSION

EHD's proposal meets all federal and state requirements. In contrast, retaining the affirmative defense provisions in a locally effective regulation outside the SIP, as suggested by two commenters, would conflict with federal Title V permit regulations and the State Act. Accordingly, EHD requests that the Air Board adopt EHD's proposal, as modified by EHD's proposed floor amendment, to remove the affirmative defense provisions from Part 49 and to authorize EHD's request to remove Part 49 from the SIP.

Respectfully submitted,

CITY OF ALBUQUERQUE

Jessica M. Hernandez
City Attorney



Eric Ames
3005 South St. Francis Drive, Suite 1D, Box 490
Santa Fe, New Mexico

Attorney for City of Albuquerque

CERTIFICATE OF SERVICE

I certify that an original and fifteen copies of this pleading were served on September 13, 2016 as follows:

By hand delivery to:

Andrew Daffern, Hearing Clerk
Albuquerque-Bernalillo County Air Quality Control Board
One Civic Plaza, NW, Room 3023
Albuquerque, New Mexico 87103

By electronic mail to:

Felicia Orth,
Hearing Officer and Counsel for the Air Board



Eric Ames



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
1201 ELM STREET
DALLAS, TEXAS 75270

March 2, 1981

Mr. Robert A. Harley, Chief
Air Pollution Control Division
P. O. Box 1293
Albuquerque, New Mexico 87103

Dear Mr. ^{Bob} Harley:

Pursuant to our 105 grant commitment, we have completed a review of Regulation 19, Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance. I submit the following comments for your consideration.

1. The Regulation provides automatic exemptions from emission limitations for excess emissions during scheduled maintenance and some other situations. According to EPA guidance, all emissions that exceed emission limitations during start-up, shut down, breakdown, or maintenance are a violation of the State Implementation Plan unless there is a sudden and unavoidable malfunction that is totally beyond the control of the owner and/or operator. The automatic exemption provision is too broadly written and should be limited to sudden unavoidable exceedances.

2. The information which the source must report to the agency must be more specific. Enough detail must be reported to enable the agency to determine that the excess emissions were caused by a sudden and unavoidable occurrence.

The April 27, 1977 Federal Register (42 FR 21472) and Guidance to State and Local Agencies in Preparing Regulations to Control Volatile Organic Compounds from Ten Stationary Source Categories (EPA-450/2-79-004) contains detailed explanations of EPA's policy concerning such excess emission regulations and the minimum acceptable reporting requirements.

If you have any questions, please call me, or Gordon Scruggs at 214/767/1518.

Sincerely,

Jack S. Divita

Jack S. Divita
Chief, Air Programs Branch

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MAR 1981
AIR POLLUTION
CONTROL DIVISION

ALBUQUERQUE/BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

AMENDED RESOLUTION #2009-6

REPEALING ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD REGULATIONS SECTION 20.11.90.12 NMAC, *BREAKDOWN, ABNORMAL OPERATING CONDITIONS, OR SCHEDULED MAINTENANCE* AND REPLACING WITH A NEW RULE, 20.11.49 NMAC, *EXCESS EMISSIONS*. ALSO AMENDING ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD REGULATIONS 20.11.65 NMAC, *VOLATILE ORGANIC COMPOUNDS*, AND 20.11.69 NMAC, *PATHOLOGICAL WASTE DESTRUCTORS*, TO CORRECT CROSS-REFERENCING. SUBMITTING NEW 20.11.49 NMAC, AND AMENDED 20.11.90 NMAC, AND 20.11.65 NMAC TO EPA AS A REVISION TO THE STATE IMPLEMENTATION PLAN (SIP)

Whereas, the New Mexico Air Quality Control Act ("Air Act"), NMSA 74-2-5, requires the Albuquerque/Bernalillo County Air Quality Control Board ("Air Board"), to "adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards" within Bernalillo County, and to meet requirements of the United States Clean Air Act, the City of Albuquerque and Bernalillo County Joint Air Quality Control Board Ordinances, and the Albuquerque/Bernalillo County Air Quality Control Board ("Air Board") Regulations; and

Whereas, on September 9, 2009, the Air Board held a public hearing in the City Council Committee Room, 9th Floor, Room 9081 of the Albuquerque/Bernalillo County Government Center, One Civic Plaza NW, in Albuquerque, New Mexico, and the hearing was held consistent with the notice requirements of the New Mexico Air Quality Control Act, and 20.11.82 NMAC, *Rulemaking Procedures - AQCB*; and

Whereas, on September 9, 2009, the Air Board met and determined that updating the local Air Quality Control Board regulations by repealing 20.11.90.12 NMAC, the automatic exemption provision, replacing the term "upset" with the term "abnormal operating conditions", and replacing the

1 term "secretary" with the term "Director", to bring New Mexico's rule into alignment with federal
2 guidance, changing language which states that excess emissions would only occur under exceptional
3 circumstances, and not during scheduled maintenance, startup or shutdown of operations, proposing a
4 requirement for a "root cause analysis" to be conducted, which is a detailed technical analysis, correct
5 cross-referencing, and to correct style and formatting is necessary; and

6 **Whereas**, at the September 9, 2009 public hearing, testimony was presented to establish a
7 present need, or a reasonably anticipated future need, which exists to warrant taking the following
8 actions to help prevent or abate air pollution;

9 **NOW, THEREFORE BE IT RESOLVED BY THE BOARD THAT:**

10 1. Regarding 20.11.49 NMAC, *Excess Emissions*, and 20.11.90.12 NMAC, *Breakdown*,
11 *Abnormal Operating Conditions, or Scheduled Maintenance*, 20.11.65 NMAC, *Volatile Organic*
12 *Compounds*, and 20.11.69 NMAC, *Pathological Waste Destructors* the Board hereby adopts the new
13 rule to 20.11.49 NMAC, *Excess Emissions*, and repeals 20.11.90.12 NMAC, *Breakdown, Abnormal*
14 *Operating Conditions, or Scheduled Maintenance*, and amends 20.11.65 NMAC, *Volatile Organic*
15 *Compounds*, and 20.11.69 NMAC, *Pathological Waste Destructors* as proposed in AQD Exhibits 1a,
16 1b, 1c and 1d, respectively which were admitted at the September 9, 2009 hearing as amended by
17 "Staff's Proposed Floor Amendments" shown as AQD Exhibit #14, and "Supplemental Floor
18 Amendments" shown as AQD Exhibit #16.
19 2. The Board hereby directs staff to take all actions necessary to submit amended regulations to EPA as
20 a revision to the SIP.

21 3. The effective date of the new rule 20.11.49 NMAC, *Excess Emissions*, and repeal of
22 20.11.90.12 NMAC, *Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance*, and
23 amended 20.11.65 NMAC, *Volatile Organic Compounds*, and 20.11.69 NMAC, *Pathological Waste*


1 *Destructors* shall be October 13, 2009.

2 4. Staff is directed to submit the new rule 20.11.49 NMAC, *Excess Emissions*, and repealed
3 20.11.90.12 NMAC, *Breakdown, Abnormal Operating Conditions, or Scheduled Maintenance*, and
4 amended 20.11.65 NMAC, *Volatile Organic Compounds*, and 20.11.69 NMAC, *Pathological Waste*
5 *Destructors* to the State Records Center in the format currently required by the State Records Center,
6 without changing the substance of the amendments as adopted by the Air Board on September 9, 2009.

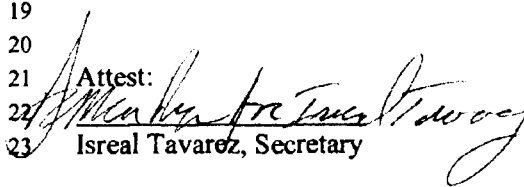
7 [WITH THE FOLLOWING CHANGES:]

8
9
10
11 PASSED AND ADOPTED THIS 9th DAY OF SEPTEMBER, 2009
12 BY A VOTE OF 6 FOR AND 0 AGAINST.

13 Absent: 1

14
15
16
17 
18 Jens Deichmann Chair
19 Albuquerque-Bernalillo County
20 Air Quality Control Board

21 Attest:

22 
23 Isreal Tavaréz, Secretary

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**EHD'S PROPOSED FLOOR AMENDMENT:
PROPOSED CHANGES TO EHD'S ORIGINAL DRAFT**

16 SEP 15 PM 4:18

REDLINE VERSION

20.11.49.16 D. Department's determination of adequacy of supplemental report.

Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for any excess emission-, including but not limited to any exceedance of a limit which already takes into account startup and shutdown emissions, any NAAQS or PSD increment, or any federally promulgated limit or any requirement derived from such limit, including 40 CFR Parts 60, 61, and 63. However, ~~the department in its sole discretion~~ may consider any relevant information, including information submitted in a supplemental report, in connection with a demand for corrective action or injunctive relief, or the assessment or negotiation of a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion, ~~and the department shall not consider information in a supplemental report in any enforcement action involving:~~

- ~~_____ (1) injunctive relief;~~
- ~~_____ (2) exceedance of limits which already take into account startup and shutdown emissions;~~
- ~~_____ (3) exceedance of the NAAQS or PSD increments;~~
- ~~_____ (4) failure to meet federally promulgated emission limits, including, but not limited to, emission limits in 40 CFR Parts 60, 61 and 63; or~~
- ~~_____ (5) violation of any requirement that derives from 40 CFR Parts 60, 61, and 63 or any other federally promulgated performance standard or emission limit.~~

**EHD'S PROPOSED FLOOR AMENDMENT:
PROPOSED CHANGES TO EHD'S ORIGINAL DRAFT**

CLEAN COPY – CHANGES INTEGRATED

20.11.49.16 D. Department's determination of adequacy of supplemental report.

Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for any excess emission, including but not limited to any exceedance of a limit which already takes into account startup and shutdown emissions, any NAAQS or PSD increment, or any federally promulgated limit or any requirement derived from such a limit, including 40 CFR Parts 60, 61, and 63. However, the department in its sole discretion may consider any relevant information, including information submitted in a supplemental report, in connection with a demand for corrective action or injunctive relief, or the assessment or negotiation of a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion.

If EHD's Proposed Floor Amendment is adopted, this page would be substituted for page 6 of EHD's Public Review, which was attached to the Petition of June 27, 2016. The text of EHD's Proposed floor amendment is indicated below in blue.

- (3) the owner or operator has identified the cause of the emergency;
- (4) the excess emission resulted from the emergency;
- (5) the excess emission and resulting emergency could not have been prevented through careful planning and design;
- (6) the excess emission and resulting emergency were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (7) at the time the excess emission and emergency occurred, the source was being properly operated;
- (8) during the period of the excess emission, the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the applicable standard, regulation, or permit condition; and
- (9) the owner or operator complied with all notification requirements in 20.11.49.15 NMAC, including a description of the emergency, any steps to mitigate emissions, and corrective actions taken.

D. Affirmative defenses prohibited. The affirmative defense provisions of this section shall not be available for:

- (1) claims for injunctive relief;
- (2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception;
- (3) excess emissions that cause an exceedance of the NAAQS or PSD increments;
- (4) failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63; or
- (5) violations of requirements that derive from 40 CFR Parts 60, 61 and 63 or any other federally enforceable performance standard or emission limit.

E. Department's determination of adequacy of affirmative defense. The department may issue a determination regarding an owner or operator's assertion of the affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to 20.11.49 NMAC or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to 20.11.49.18 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Paragraph (15) of Subsection B of 20.11.49.15 NMAC.]

D. Department's determination of adequacy of supplemental report. Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for any excess emission, including but not limited to any exceedance of a limit which already takes into account startup and shutdown emissions, any NAAQS or PSD increment, or any federally promulgated limit or any requirement derived from such a limit, including 40 CFR Parts 60, 61, and 63. However, the department in its sole discretion may consider any relevant information, including information submitted in a supplemental report, in connection with a demand for corrective action or injunctive relief, or the assessment or negotiation of a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion.

[20.11.49.16 NMAC - N, 10/13/09; A, XX/XX/16]

20.11.49.17 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS:

A. Upon receipt of a written demand by the department, the owner or operator of a source having an excess emission, shall prepare an analysis that uses analytical tools determined by the department to be appropriate. The analysis shall contain the following information:

- (1) an analysis describing the root cause and all contributing causes of the excess emission; and
- (2) an analysis of the corrective actions implemented or available to reduce the likelihood of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.11.49.17 NMAC, including, as applicable:
 - (a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;

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16 SEP 15 PM 4: 19 AIR QUALITY CONTROL BOARD



IN THE MATTER OF PETITION TO AMEND
20.11.49 NMAC- *EXCESS EMISSIONS*

AQCB Petition No.2016-3

Environmental Health Department,
City of Albuquerque, Petitioner

**ENVIRONMENTAL HEALTH DEPARTMENT'S
PROPOSED AMENDED ORDER AND STATEMENT OF REASONS
FOR ADOPTING AMENDMENTS TO
20.11.49 NMAC, *EXCESS EMISSIONS***

This matter comes before the Albuquerque – Bernalillo County Air Quality Control Board (“Air Board”) upon a Petition filed by the City of Albuquerque Environmental Health Department (“EHD”), proposing amendments to 20.11.49 NMAC – *Excess Emissions* (“EHD’s Proposed Rule”) and a request to the U.S. Environmental Protection Agency (“EPA”) to withdraw the regulation in its entirety from the State Implementation Plan (“SIP”).

A public hearing was held in Albuquerque on September 14, 2016, with a quorum of the Air Board present during the hearing. Following the hearing, the Air Board deliberated and voted to adopt the proposed amendments for the reasons that follow:

Findings of Fact

1. 20.11.49 NMAC – *Excess Emissions*, creates processes for addressing excess emissions by stationary sources. An excess emission is an unexpected emission of a regulated air pollutant from a stationary source that violates an emission limit in a permit or regulation. Reyes Testimony, page 2; Rocha Testimony, pages 1-2.

2. Among other provisions, the currently effective 20.11.49 NMAC in effect prior to this rulemaking allowed an owner or operator of a stationary source (“Permittee”) to claim an affirmative defense for excess emissions that occur during startup, shutdown, malfunction, and

emergency. An affirmative defense claim under 20.11.49 NMAC requires a Permittee to describe extenuating circumstances of an excess emission that, in the Permittee's view, make the excess emission unpreventable and relief from civil penalties thus warranted. EHD would evaluate such claims to determine whether they had sufficient factual support. If they did, relief from penalties would be granted. If they did not, penalties could be assessed and the Permittee could appeal EHD's decision to the Court of Appeals. Reyes Testimony, pages 4-5.

3. On May 22, 2015, EPA issued a determination ("SIP Call") that excess emissions SIP provisions for 36 states, including provisions for Albuquerque and Bernalillo County, New Mexico, were "substantially inadequate" to comply with the federal Clean Air Act. The SIP Call imposed a deadline of November 22, 2016 for affected jurisdictions to send an appropriate proposed SIP revision to EPA for approval. Rocha Testimony, pages 2-3, 5-6.

4. The SIP Call cited specific provisions within 20.11.49 NMAC that EPA concluded were substantially inadequate under the Clean Air Act because they unlawfully impeded the discretion of federal courts to assess penalties under Sections 113 and 304 of the Act. The impermissible provisions in 20.11.49 NMAC related to affirmative defenses for excess emissions during startup, shutdown, malfunction, and emergency. The SIP Call stated that removal of these specific provisions would comply with the SIP Call requirement to submit an appropriate proposed SIP revision in response. Rocha Testimony, pages 3-5.

5. The SIP Call provided guidance on two alternative regulatory approaches for excess emissions that could potentially avoid conflict with the Clean Air Act. One approach was to formulate alternative emission limitations in a SIP regulation that would specifically address

excess emissions in a particular source category. EHD testimony at the hearing demonstrated that adopting this approach was problematic due to the severe technical and logistical burdens it would impose. Rocha Testimony, Pages 6 to 7.

6. The other EPA recommended approach relied on the enforcement discretion of a state or local air agency to address individual episodes of excess emissions on a case by case basis. The SIP Call recommended specific criteria that could guide the exercise of such discretion under the “enforcement discretion approach.” Rocha Testimony, pages 6-9.

7. On June 27, 2016, EHD petitioned the Air Board (“Petition”) for a rulemaking to amend 20.11.49 NMAC and respond to the SIP Call by, among other things, removing language providing affirmative defenses for excess emissions. A public review draft of EHD’s Proposed Rule was attached to the Petition.

8. In accordance with the state Air Quality Control Act (“Air Act”), NMSA 1978 § 74-2-6(C), Revised Ordinances of Albuquerque (“ROA”) § 9-5-1-6(C), Bernalillo County Ordinances 30-35(c), 20.11.82.19 NMAC, and other state law, a notice of public hearing to consider EHD’s Proposed Rule was properly published on July 29, 2016, in the New Mexico Register and in the Albuquerque Journal on the same day. All requirements for notice of this hearing were satisfied.

9. Both the Petition and hearing notice were emailed to persons known to be interested in Air Board rulemaking proceedings or in the EPA SIP Call in particular. The Petition was emailed on June 27, 2016, the day the Petition was filed. The hearing notice was emailed on July 29, 2016, the day notice was published in the New Mexico Register and Albuquerque Journal.

10. The public hearing on EHD's Proposed Rule was held in Albuquerque, New Mexico on September 14, 2016. The hearing was held in accordance with procedures in 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*.

11. EHD testimony at the hearing showed that EHD's Proposed Rule was drafted in close consultation with EPA Region 6 to be consistent with the "enforcement discretion approach" described in EPA's SIP Call. EPA has stated that the resulting draft of EHD's Proposed Rule attached to EHD's Petition appears to meet all the SIP Call requirements. It does so by proposing amendments to the language of 20.11.49 NMAC removing all provisions related to affirmative defenses, and substituting provisions relying on the exercise of EHD's enforcement discretion to address excess emissions episodes on a case by case basis. Rocha Testimony, pages 9-10.

12. EHD's Proposed Rule replaces affirmative defense language in 20.11.49 NMAC with language allowing a Permittee to file a "supplemental report" describing the circumstances of an excess emission occurring during startup, shutdown, malfunction, or emergency. A supplemental report on an excess emission, like a claim for an affirmative defense, requires the Permittee to present facts demonstrating that the excess emission wasn't reasonably preventable and thus wasn't the Permittee's fault. As with a claim for an affirmative defense, a supplemental report allows the Permittee to ask for relief from civil penalties. As with a claim for an affirmative defense, EHD will evaluate the supplemental report to determine if the facts presented are sufficient to warrant relief from penalties. The Permittee may appeal EHD's decision to the Court of Appeals, as was the case with an affirmative defense. Reyes Testimony, pages 6-9.

13. EHD's testimony showed that enforcement processes under EHD's Proposed Rule can lead to a similar end result to what has occurred in the past using affirmative defenses for excess emissions due to startup, shutdown, malfunction, or emergency. The process for filing a supplemental report will be similar to the one for claiming an affirmative defense, requiring demonstration of essentially the same facts to warrant relief from civil penalties. EHD will approach enforcement decisions under the amended 20.11.49 NMAC as it did under the prior version. If an excess emission was truly unpreventable, EHD anticipates using its enforcement discretion to relieve a Permittee from penalties for it. Reyes Testimony, pages 8-9.

14. EHD's testimony showed that EHD's Proposed Rule makes certain other advisable minor changes to the language of 20.11.49 NMAC, not required by the SIP Call, for clarity and consistency. In consultations with EHD, EPA had no objection to these changes. Rocha Testimony, pages 11-12.

15. EHD's testimony showed that removal of the entire 20.11.49 NMAC from the SIP, at the recommendation of EPA Region 6, is advisable because the Clean Air Act contains no requirement for states to have a regulation addressing enforcement provisions for excess emissions. Rocha Testimony, page 10.

16. EHD's testimony showed that EHD's Proposed Rule and withdrawal of 20.11.49 NMAC from the SIP will maintain air quality and meet all other Clean Air Act requirements, as required by Section 110(l) of the Act Rocha Testimony, page 11.

17. One stakeholder, Western Refining, submitted pre-rulemaking comments to EHD advocating retention of affirmative defense language in 20.11.49 NMAC and withdrawal of such language from the SIP. Rocha Testimony, page 13.

18. EHD's testimony reported EPA's position that the Western Refining approach is potentially approvable by the EPA as a response to the SIP Call. Rocha Testimony, page 14.

19. However, EHD testimony showed that adopting the Western Refining approach over EHD's Proposed Rule is not advisable. According to EPA Region 6, the Western Refining approach would leave 20.11.49 NMAC in violation of an EPA regulation regarding operating permit programs required under Title V of the Clean Air Act, which apply primarily to large air pollutant sources. The EPA regulation in question, 40 CFR § 70.11(a)(3), requires an air agency to retain sufficient authority under state law to recover civil penalties in a judicial enforcement action. EPA Region 6 informed EHD that affirmative defense provisions in 20.11.49 NMAC, even as a state (or local) only rule, would violate the above EPA requirement by limiting or restricting EHD's ability to recover civil penalties in court if a source could establish the necessary factual criteria. EPA stated that EHD might face a future EPA notice of deficiency in its Title V operating permit program for large sources if 20.11.49 NMAC retained affirmative defense language as a state only regulation. In that event, a new rulemaking to amend 20.11.49 NMAC would be necessary to avoid an EPA takeover of Title V permitting authority in Albuquerque and Bernalillo County. Rocha Testimony, pages 14-15.

20. At the hearing EHD introduced a proposed floor amendment to modify its original draft amended 20.11.49 NMAC, which was attached to EHD's Petition of June 27, 2016. The floor amendment proposed to modify EHD's original draft language in 20.11.49.16 NMAC, Subsection D. EHD's original language appeared to prohibit any consideration of information in

a supplemental report in five specific situations, whether in determining liability for an excess emission or designing a remedy for a violation. EHD stated at the hearing that, in fact, consideration of such information would be essential for designing a remedy. The new language, EHD showed, would allow such consideration. EHD Supplemental Exhibits #1 and #2.

21. All persons present at the hearing were given an opportunity to make a statement regarding the proposed amendments and to cross-examine all witnesses. _____ members of the public appeared at the public hearing and asked questions following EHD's introduction of its testimony. _____ members of the public made oral comments on EHD's Proposed Rule. _____ written comments presented at the hearing were received by the hearing clerk. _____ written comments from the public were received prior to the hearing.

22. All testimony at the hearing was taken under oath. A court reporter prepared a transcript of the proceeding.

23. The hearing record _____ (was or was not) left open after the hearing.

24. Following the hearing, the Air Board deliberated and voted on _____ (date) to adopt the proposed amendments by a vote of _____.

Conclusions of Law

1. The Air Board is authorized to "adopt, promulgate, publish, amend and repeal regulations" consistent with the Air Act and "adopt a plan for the regulation, control, prevention, or abatement of air pollution[.]" NMSA 1978 § 74-2-5(B)(1) and (B)(2) ("Air Act"). In adopting regulations, the Air Board "shall give weight it deems appropriate to all facts and circumstances," including but not limited to those enumerated in the Air Act. NMSA 1978 § 74-2-5(E).

2. City and County Ordinances authorize the Air Board, in accordance with the Air Act, to adopt regulations and plans within Albuquerque and Bernalillo County addressing facts and circumstances the Air Board deems appropriate. ROA § 9-5-1-4(A), (B) and (C); Bernalillo County Ordinances 30-33(a), (b) and (c).

3. The presence of affirmative defenses in a SIP violates Sections 113 and 304 of the Clean Air Act. Therefore, 20.11.49 NMAC, including its affirmative defense provisions, must be removed from the Albuquerque-Bernalillo County portion of the New Mexico SIP.

4. Affirmative defense provisions in 20.11.49 NMAC, even when effective only as a state or local only regulation, violate EPA Title V regulations at 40 CFR § 70.11(a)(3). Therefore, affirmative defense provisions must be removed from the language of the regulation, over and above removal of the regulation itself from the SIP.

5. Affirmative defense provisions in 20.11.49 NMAC, even when effective only as a state or local regulation, may violate the state Air Act, which assigns state courts sole discretion to assess penalties in a judicial enforcement action. NMSA 1978 § 74-2-12.1. *See also Espinosa v. Roswell Tower Inc.*, 1996-NMCA-006, ¶ 33, 121 N.M. 306 (“the award of penalties is in the sound discretion of the trial court.”).

6. The actions requested in EHD’s Petition, Technical Testimony, and proposed floor amendment are consistent with all requirements of the Clean Air Act, including those addressed in the EPA SIP Call, Sections 113 and 304 of the Clean Air Act, and in EPA’s regulations governing state and local Title V operating permit programs, 40 CFR § 70.11(a)(3). The EHD actions that the Air Board concludes are consistent with the foregoing federal laws include removal of 20.11.49 NMAC in its entirety from the SIP, amending the regulation under state law to remove all affirmative defense provisions, substituting enforcement discretion

provisions to address excess emissions episodes, and adopting EHD's proposed floor amendment introduced at the hearing.

7. EHD's proposed floor amendment is a logical outgrowth of EHD's original proposed regulatory change and does not fundamentally alter the regulation as originally proposed in EHD's Petition of June 27, 2016.

8. Enforcement processes for Permittees under the amended 20.11.49 NMAC would allow such processes to reach a similar end result to those obtained under affirmative defenses. Permittees would continue to be able to request relief from civil penalties for excess emissions, to be granted such relief when circumstances warranted, and to appeal EHD's assessment of penalties to the Court of Appeals.

9. Unlike the actions requested in EHD's Petition, the alternative of removing 20.11.49 NMAC only from the SIP, while retaining affirmative defenses in a regulation effective only under state (and local) law, would leave 20.11.49 NMAC in violation of federal law regarding requirements at 40 CFR § 70.11(a)(3) for state and local Title V operating permit programs.

10. In light of the foregoing, this rulemaking action is within the Air Board's legal authority and addresses all appropriate facts and circumstances. NMSA 1978, § 74-2-4(E); ROA §9-5-1-4(C); and Bernalillo County Ordinances, § 30-33(C).

Order

1. It is hereby ordered that the proposed regulatory change attached to EHD's Petition filed June 27, 2016 is adopted, as modified by EHD's proposed floor amendment, with any non-substantive modifications necessary for filing with the State Records Center and Archives.
2. The amended 20.11.49 NMAC shall become effective 30 days after filing with the State Records Center and Archives. NMSA 1978 § 74-2-6(F).
3. Upon the amended 20.11.49 NMAC being filed with the State Records Center and Archives and published in the New Mexico Register as required by NMSA 1978 § 14-4-1 et seq., it is hereby ordered that EHD prepare and send a proposed SIP revision to EPA consistent with the requirements in 40 CFR Part 51, Appendix V, requesting that EPA remove 20.11.49 NMAC in its entirety from the SIP.

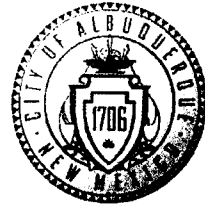
ISSUED this _____ day of September, 2016

Jane Cudney-Black
Chair, Albuquerque – Bernalillo County Air Quality Control Board

CITY OF ALBUQUERQUE

Environmental Health Department

Mary Lou Leonard, Director



September 7, 2016

Robin DeLapp
Technical Project Manager
PNM Resources Environmental Services
2401 Aztec Rd NE
Mail Stop Z100
Albuquerque NM 87107

RECEIVED
ENVIRONMENTAL HEALTH
16 SEP 15 PM 4:19

Dear Robin DeLapp:

Thank you for your comments of August 30, 2016 ("PNM Letter") on the Environmental Health Department's (EHD) draft amended 20.11.49 NMAC, *Excess Emissions*. Our response follows.

The PNM Letter suggested withdrawing affirmative defense provisions of 20.11.49 NMAC from the SIP and retaining them unchanged as provisions in a "state only" regulation, outside of the SIP. EHD agrees that this approach would be potentially approvable by EPA as a response to the SIP Call

However, EHD has concluded that this approach suffers from a critical disadvantage. In particular, EPA has informed EHD that state only affirmative defenses would threaten the City / County's federally delegated permitting authority for Title V sources. 40 CFR 70.11(a)(3)(i) provides that a state operating permit program must contain provisions to "assess or sue to recover in court civil penalties...for violation of any applicable requirement [among other things]." EPA takes the position that the affirmative defense provisions in the existing language of 20.11.49 NMAC would violate this Title V requirement even if it were a "state only" provision.

Thus, if the Albuquerque – Bernalillo County Air Quality Control Board left Part 49 intact and it was only removed from the SIP, this may not resolve the issue about affirmative defenses. EHD might then receive a deficiency notice from EPA about its Title V program. At that point, EHD would have to propose a second rulemaking which would likely propose what EHD is proposing now—to replace affirmative defenses with enforcement discretion. EHD sees no benefit in conducting two rulemakings where one would suffice. EHD further notes that EPA recently introduced a proposed rule finding affirmative defense provisions in state Title V programs incompatible with the Clean Air Act.¹

¹ 80 Fed. Reg. 38,645 (June 14, 2016).

PO Box 1293

Albuquerque

NM 87103

www.cabq.gov

To avoid future issues with its Title V permitting program and bring 20.11.49 NMAC into compliance with all EPA regulations, EHD is requesting a reporting and enforcement discretion approach and does not plan to request "state only" affirmative defenses.

EHD believes this is the best resolution. EPA has pointed out that there is a high level of public interest in affirmative defenses.² Litigation about affirmative defenses for excess emissions has continued for years.³ Retaining state only affirmative defenses only prolongs the legal uncertainty.

Enforcement discretion can achieve the same end result as affirmative defenses have in the past. The owner or operator of the source will have an opportunity to provide information to EHD to show why relief from civil penalties is warranted based on the facts. While EHD understands that an owner or operator may prefer an affirmative defense, EHD expects that enforcement discretion will lead to similar end results with less long term legal uncertainty.

Thank you again for your comments. If you have further comments or questions, please contact me at emerta@cabq.gov, (505) 768-2660, or Dario Rocha, Control Strategies Manager, at drocha@cabq.gov, (505) 768-2637.

Sincerely,



Ed Merta
Air Quality Regulation Development Coordinator
Air Quality Program
Environmental Health Department
City of Albuquerque

² 80 Fed. Reg. 33,840 at 33,844 (June 12, 2015).

³ See *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014); *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013); *Montana Sulfur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); Settlement Agreement, November 30, 2011, *Sierra Club et al. v. Jackson*, No. 3:10-cv-06060-CRB (N.D. Cal.); *Arizona Public Service Co. v. EPA*, 562 F.3d 1116 (9th Cir. 2009); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008).

From: Marcus Rael
To: Parker, Carol M.; Merta, Ed L.
Cc: Textor, Marise; Scott Janoe (Scott.Janoe@bakerbotts.com)
Subject: EPA Letter to State of New Mexico
Date: Tuesday, September 13, 2016 8:30:45 AM
Attachments: NMED Exhibit 15 EPA Approval Letter SIP Revisions May 25, 2016.pdf

Carol, Please take a look at the attachment to this email. This is EPA's letter telling the State of New Mexico that they would approve removing the affirmative defense provisions from the SIP but leaving them in the rules as state only. While this is a preliminary determination, it is consistent with EPA's policy. We believe it would be arbitrary and capricious for EPA to approve such an approach for the State of New Mexico, but disapprove a similar or identical approach for Albuquerque. Please take a look and think about the issues that could arise from a different result from the Bernalillo County Air Quality Board. If you would discuss this with your internal people and give me a call regarding our discussion last week, I would appreciate it. I am available on my cell all morning 505-440-6324.

Thanks,

Marcus

Marcus J. Rael, Jr.
Managing Partner
Robles, Rael & Anaya, P.C.
500 Marquette Ave NW Suite 700
Albuquerque, NM 87102
(505) 242-2228 Phone
Marcus@roblesrael.com

RECEIVED
ENVIRONMENTAL HEALTH
16 SEP 15 PM 4:19



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

FILED
MAY 31 2016
At County Clerk's Office

MAY 25 2016

Rita Bates
Planning Section Chief
Air Quality Bureau
New Mexico Environment Department
525 Camino de los Marquez, Suite 1
Santa Fe, NM 87505-1816

Dear Ms. Bates:

Thank you for the opportunity to review and comment on the proposed revisions to the New Mexico Administrative Code, Title 20, Chapter 2, Part 7 - Excess Emissions (hereinafter "Excess Emissions Rule"). The EPA appreciates your efforts to address the EPA's June 12, 2015 (80 FR 33840) State Implementation Plan (SIP) Call. It is our understanding that New Mexico intends to withdraw the affirmative-defense-related provisions of the existing Excess Emissions Rule from the EPA-approved New Mexico SIP, and at the same time maintain the existing Excess Emissions Rule as a "state-only" rule. As proposed, the provisions to be withdrawn from the New Mexico SIP are 20.2.7.6 (B) NMAC, 20.2.7.110(B)(15) NMAC, 20.2.7.111 NMAC, 20.2.7.112 NMAC, 20.2.7.113 NMAC, 20.2.7.115 NMAC, and 20.2.7.116 NMAC. Consequently, the existing Excess Emissions Rule except those sections identified above will remain a part of the EPA-approved SIP for New Mexico.

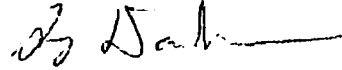
As proposed, we continue to believe that an approach of retaining affirmative defense-related provisions of the Excess Emissions Rule as a matter of state law, outside of the SIP ("State-only"), would be consistent with CAA requirements, and consistent with the EPA's guidance in the Startup, Shutdown, and Malfunction (SSM) Policy. Indeed, the EPA specifically addressed this potential approach in the SSM SIP Call. See 80 FR at 33855-56. "State-only" affirmative defense provisions, even though outside the SIP, should be properly worded and not preclude enforcement by the state for violations of CAA requirements, including the authority to assess or sue to recover in court civil penalties and to seek criminal remedies for violations of any applicable requirement. See section 110(a)(2)(C), and 40 CFR 70.11(a)(3). Otherwise, this could be problematic with approvability of Infrastructure SIPs for New Mexico and/or your Operating Permit program.

Our specific comments are:

1. Your SIP submittal letter should include a statement that New Mexico is requesting the EPA's review/approval of the removal of sections of the Excess Emissions Rule identified above from the New Mexico SIP, as required by the EPA's SSM SIP Call of June 12, 2015 (80 FR 33968).
2. Due to the fact that New Mexico is proposing to remove certain provisions from the New Mexico SIP, a demonstration under Clean Air Act Section 110(l) is a necessary component of your SIP submittal to the EPA. See June 12, 2015 (80 FR 33975). If you require assistance with the requirements for an appropriate Section 110(l) demonstration, the EPA Regional staff can provide assistance.

Should you have any questions regarding this letter, please feel free to contact me at (214) 665-7242.

Sincerely,

A handwritten signature in black ink, appearing to read "Guy Donaldson", followed by a horizontal line.

Guy Donaldson
Chief
Air Planning Section

From: Parker, Carol M.
To: Marcus Rael; Merta, Ed L.
Cc: Textor, Marise; Scott.Janoe (Scott.Janoe@bakerbotts.com)
Subject: RE: EPA Letter to State of New Mexico
Date: Tuesday, September 13, 2016 12:17:58 PM

Thank you for your email, Marcus. EHD does not dispute that EPA has stated that some versions of affirmative defenses outside of a SIP might be approvable responses to the SIP Call. However, EPA has informed EHD that EHD's Part 49 outside of the SIP would violate Title V (even if it might be an approvable response to the SIP). Note the last sentence of EPA's second paragraph in the letter you attached to your email which suggests that this exact problem can arise. So, EPA's response to NMED may not be inconsistent with its response to EHD. If an amended Part 49 violated Title V, EPA would issue a Notice of Deficiency and EHD would then have to petition for a second rulemaking about Part 49. In light of EPA's communication that Part 49 as a local only rule would violate Title V, EHD does not support simply taking Part 49 out of the SIP and leaving it as a local only rule.

Thank you.

Carol

From: Marcus Rael [<mailto:Marcus@roblesrael.com>]
Sent: Tuesday, September 13, 2016 8:30 AM
To: Parker, Carol M.; Merta, Ed L.
Cc: Textor, Marise; Scott.Janoe (Scott.Janoe@bakerbotts.com)
Subject: EPA Letter to State of New Mexico

Carol, Please take a look at the attachment to this email. This is EPA's letter telling the State of New Mexico that they would approve removing the affirmative defense provisions from the SIP but leaving them in the rules as state only. While this is a preliminary determination, it is consistent with EPA's policy. We believe it would be arbitrary and capricious for EPA to approve such an approach for the State of New Mexico, but disapprove a similar or identical approach for Albuquerque. Please take a look and think about the issues that could arise from a different result from the Bernalillo County Air Quality Board. If you would discuss this with your internal people and give me a call regarding our discussion last week, I would appreciate it. I am available on my cell all morning 505-440-6324.

Thanks,

Marcus

Marcus J. Rael, Jr.
Managing Partner
Robles, Rael & Anaya, P.C.
500 Marquette Ave NW Suite 700
Albuquerque, NM 87102
(505) 242-2228 Phone

**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF PETITION TO AMEND
20.11.49 NMAC- *EXCESS EMISSIONS***

AQCB Petition No. 2016-3

**Environmental Health Department,
City of Albuquerque, Petitioner**

**ORDER AND STATEMENT OF REASONS
FOR ADOPTING AMENDMENTS TO
20.11.49 NMAC, *EXCESS EMISSIONS***

This matter comes before the Albuquerque – Bernalillo County Air Quality Control Board (“Air Board”) upon a Petition filed by the City of Albuquerque Environmental Health Department (“EHD”), proposing amendments to 20.11.49 NMAC – *Excess Emissions* (“EHD’s Proposed Rule”) and a request to the U.S. Environmental Protection Agency (“EPA”) to withdraw the regulation in its entirety from the State Implementation Plan (“SIP”).

A public hearing was held in Albuquerque on September 14, 2016, with a quorum of the Air Board present during the hearing. Following the hearing, the Air Board deliberated and voted to adopt the proposed amendments for the reasons that follow:

Findings of Fact

1. 20.11.49 NMAC – *Excess Emissions*, creates processes for addressing excess emissions by stationary sources. An excess emission is an unexpected emission of a regulated air pollutant from a stationary source that violates an emission limit in a permit or regulation. Reyes Testimony, page 2; Rocha Testimony, pages 1-2.

2. Among other provisions, the currently effective 20.11.49 NMAC in effect prior to this rulemaking allowed an owner or operator of a stationary source (“Permittee”) to claim an affirmative defense for excess emissions that occur during startup, shutdown, malfunction, and

emergency. An affirmative defense claim under 20.11.49 NMAC requires a Permittee to describe extenuating circumstances of an excess emission that, in the Permittee's view, make the excess emission unpreventable and relief from civil penalties thus warranted. EHD would evaluate such claims to determine whether they had sufficient factual support. If they did, relief from penalties would be granted. If they did not, penalties could be assessed and the Permittee could appeal EHD's decision to the Court of Appeals. Reyes Testimony, pages 4-5.

3. On May 22, 2015, EPA issued a determination ("SIP Call") that excess emissions SIP provisions for 36 states, including provisions for Albuquerque and Bernalillo County, New Mexico, were "substantially inadequate" to comply with the federal Clean Air Act. The SIP Call imposed a deadline of November 22, 2016 for affected jurisdictions to send an appropriate proposed SIP revision to EPA for approval. Rocha Testimony, pages 2-3, 5-6.

4. The SIP Call cited specific provisions within 20.11.49 NMAC that EPA concluded were substantially inadequate under the Clean Air Act because they unlawfully impeded the discretion of federal courts to assess penalties under Sections 113 and 304 of the Act. The impermissible provisions in 20.11.49 NMAC related to affirmative defenses for excess emissions during startup, shutdown, malfunction, and emergency. The SIP Call stated that removal of these specific provisions would comply with the SIP Call requirement to submit an appropriate proposed SIP revision in response. Rocha Testimony, pages 3-5.

5. The SIP Call provided guidance on two alternative regulatory approaches for excess emissions that could potentially avoid conflict with the Clean Air Act. One approach was to formulate alternative emission limitations in a SIP regulation that would specifically address

excess emissions in a particular source category. EHD testimony at the hearing demonstrated that adopting this approach was problematic due to the severe technical and logistical burdens it would impose. Rocha Testimony, Pages 6 to 7.

6. The other EPA recommended approach relied on the enforcement discretion of a state or local air agency to address individual episodes of excess emissions on a case by case basis. The SIP Call recommended specific criteria that could guide the exercise of such discretion under the “enforcement discretion approach.” Rocha Testimony, pages 6-9.

7. On June 27, 2016, EHD petitioned the Air Board (“Petition”) for a rulemaking to amend 20.11.49 NMAC and respond to the SIP Call by, among other things, removing language providing affirmative defenses for excess emissions. A public review draft of EHD’s Proposed Rule was attached to the Petition.

8. In accordance with the state Air Quality Control Act (“Air Act”), NMSA 1978 § 74-2-6(C), Revised Ordinances of Albuquerque (“ROA”) § 9-5-1-6(C), Bernalillo County Ordinances 30-35(c), 20.11.82.19 NMAC, and other state law, a notice of public hearing to consider EHD’s Proposed Rule was properly published on July 29, 2016, in the New Mexico Register and in the Albuquerque Journal on the same day. All requirements for notice of this hearing were satisfied.

9. Both the Petition and hearing notice were emailed to persons known to be interested in Air Board rulemaking proceedings or in the EPA SIP Call in particular. The Petition was emailed on June 27, 2016, the day the Petition was filed. The hearing notice was emailed on July 29, 2016, the day notice was published in the New Mexico Register and Albuquerque Journal.

10. The public hearing on EHD's Proposed Rule was held in Albuquerque, New Mexico on September 14, 2016. The hearing was held in accordance with procedures in 20.11.82 NMAC, *Rulemaking Procedures – Air Quality Control Board*.

11. EHD testimony at the hearing showed that EHD's Proposed Rule was drafted in close consultation with EPA Region 6 to be consistent with the "enforcement discretion approach" described in EPA's SIP Call. EPA has stated that the resulting draft of EHD's Proposed Rule attached to EHD's Petition appears to meet all the SIP Call requirements. It does so by proposing amendments to the language of 20.11.49 NMAC removing all provisions related to affirmative defenses, and substituting provisions relying on the exercise of EHD's enforcement discretion to address excess emissions episodes on a case by case basis. Rocha Testimony, pages 9-10.

12. EHD's Proposed Rule replaces affirmative defense language in 20.11.49 NMAC with language allowing a Permittee to file a "supplemental report" describing the circumstances of an excess emission occurring during startup, shutdown, malfunction, or emergency. A supplemental report on an excess emission, like a claim for an affirmative defense, requires the Permittee to present facts demonstrating that the excess emission wasn't reasonably preventable and thus wasn't the Permittee's fault. As with a claim for an affirmative defense, a supplemental report allows the Permittee to ask for relief from civil penalties. As with a claim for an affirmative defense, EHD will evaluate the supplemental report to determine if the facts presented are sufficient to warrant relief from penalties. The Permittee may appeal EHD's decision to the Court of Appeals, as was the case with an affirmative defense. Reyes Testimony, pages 6-9.

13. EHD's testimony showed that enforcement processes under EHD's Proposed Rule can lead to a similar end result to what has occurred in the past using affirmative defenses for excess emissions due to startup, shutdown, malfunction, or emergency. The process for filing a supplemental report will be similar to the one for claiming an affirmative defense, requiring demonstration of essentially the same facts to warrant relief from civil penalties. EHD will approach enforcement decisions under the amended 20.11.49 NMAC as it did under the prior version. If an excess emission was truly unpreventable, EHD anticipates using its enforcement discretion to relieve a Permittee from penalties for it. Reyes Testimony, pages 8-9.

14. EHD's testimony showed that EHD's Proposed Rule makes certain other advisable minor changes to the language of 20.11.49 NMAC, not required by the SIP Call, for clarity and consistency. In consultations with EHD, EPA had no objection to these changes. Rocha Testimony, pages 11-12.

15. EHD's testimony showed that removal of the entire 20.11.49 NMAC from the SIP, at the recommendation of EPA Region 6, is advisable because the Clean Air Act contains no requirement for states to have a regulation addressing enforcement provisions for excess emissions. Rocha Testimony, page 10.

16. EHD's testimony showed that EHD's Proposed Rule and withdrawal of 20.11.49 NMAC from the SIP will maintain air quality and meet all other Clean Air Act requirements, as required by Section 110(l) of the Act Rocha Testimony, page 11.

17. One stakeholder, Western Refining, submitted pre-rulemaking comments to EHD advocating retention of affirmative defense language in 20.11.49 NMAC and withdrawal of such language from the SIP. Rocha Testimony, page 13.

18. EHD's testimony reported EPA's position that the Western Refining approach is potentially approvable by the EPA as a response to the SIP Call. Rocha Testimony, page 14.

19. However, EHD testimony showed that adopting the Western Refining approach over EHD's Proposed Rule is not advisable. According to EPA Region 6, the Western Refining approach would leave 20.11.49 NMAC in violation of an EPA regulation regarding operating permit programs required under Title V of the Clean Air Act, which apply primarily to large air pollutant sources. The EPA regulation in question, 40 CFR § 70.11(a)(3), requires an air agency to retain sufficient authority under state law to recover civil penalties in a judicial enforcement action. EPA Region 6 informed EHD that affirmative defense provisions in 20.11.49 NMAC, even as a state (or local) only rule, would violate the above EPA requirement by limiting or restricting EHD's ability to recover civil penalties in court if a source could establish the necessary factual criteria. EPA stated that EHD might face a future EPA notice of deficiency in its Title V operating permit program for large sources if 20.11.49 NMAC retained affirmative defense language as a state only regulation. In that event, a new rulemaking to amend 20.11.49 NMAC would be necessary to avoid an EPA takeover of Title V permitting authority in Albuquerque and Bernalillo County. Rocha Testimony, pages 14-15.

20. At the hearing EHD introduced a proposed floor amendment to modify its original draft amended 20.11.49 NMAC, which was attached to EHD's Petition of June 27, 2016. The floor amendment proposed to modify EHD's original draft language in 20.11.49.16 NMAC, Subsection D. EHD's original language appeared to prohibit any consideration of information in

a supplemental report in five specific situations, whether in determining liability for an excess emission or designing a remedy for a violation. EHD stated at the hearing that, in fact, consideration of such information would be essential for designing a remedy. The new language, EHD showed, would allow such consideration. EHD Supplemental Exhibits #1 and #2.

21. All persons present at the hearing were given an opportunity to make a statement regarding the proposed amendments and to cross-examine all witnesses. No members of the public appeared at the public hearing and asked questions following EHD's introduction of its testimony. No members of the public made oral comments on EHD's Proposed Rule. No written comments presented at the hearing were received by the hearing clerk. Three written comments from the public were received prior to the hearing.

22. All testimony at the hearing was taken under oath. A court reporter prepared a transcript of the proceeding.

23. The hearing record was not left open after the hearing.

24. Following the hearing, the Air Board deliberated and voted on September 14, 2016 to adopt the proposed amendments by a vote of 6-0.

Conclusions of Law

1. The Air Board is authorized to "adopt, promulgate, publish, amend and repeal regulations" consistent with the Air Act and "adopt a plan for the regulation, control, prevention, or abatement of air pollution[.]" NMSA 1978 § 74-2-5(B)(1) and (B)(2) ("Air Act"). In adopting regulations, the Air Board "shall give weight it deems appropriate to all facts and circumstances," including but not limited to those enumerated in the Air Act. NMSA 1978 § 74-2-5(E).

2. City and County Ordinances authorize the Air Board, in accordance with the Air

Act, to adopt regulations and plans within Albuquerque and Bernalillo County addressing facts and circumstances the Air Board deems appropriate. ROA § 9-5-1-4(A), (B) and (C); Bernalillo County Ordinances 30-33(a), (b) and (c).

3. The presence of affirmative defenses in a SIP violates Sections 113 and 304 of the Clean Air Act. Therefore, 20.11.49 NMAC, including its affirmative defense provisions, must be removed from the Albuquerque-Bernalillo County portion of the New Mexico SIP.

4. Affirmative defense provisions in 20.11.49 NMAC, even when effective only as a state or local only regulation, violate EPA Title V regulations at 40 CFR § 70.11(a)(3). Therefore, affirmative defense provisions must be removed from the language of the regulation, over and above removal of the regulation itself from the SIP.

5. Affirmative defense provisions in 20.11.49 NMAC, even when effective only as a state or local regulation, may violate the state Air Act, which assigns state courts sole discretion to assess penalties in a judicial enforcement action. NMSA 1978 § 74-2-12.1. *See also Espinosa v. Roswell Tower Inc.*, 1996-NMCA-006, ¶ 33, 121 N.M. 306 (“the award of penalties is in the sound discretion of the trial court.”).

6. The actions requested in EHD’s Petition, Technical Testimony, and proposed floor amendment are consistent with all requirements of the Clean Air Act, including those addressed in the EPA SIP Call, Sections 113 and 304 of the Clean Air Act, and in EPA’s regulations governing state and local Title V operating permit programs, 40 CFR § 70.11(a)(3). The EHD actions that the Air Board concludes are consistent with the foregoing federal laws include removal of 20.11.49 NMAC in its entirety from the SIP, amending the regulation under state law to remove all affirmative defense provisions, substituting enforcement discretion provisions to address excess emissions episodes, and adopting EHD’s proposed floor amendment

introduced at the hearing.

7. EHD's proposed floor amendment is a logical outgrowth of EHD's original proposed regulatory change and does not fundamentally alter the regulation as originally proposed in EHD's Petition of June 27, 2016.

8. Enforcement processes for Permittees under the amended 20.11.49 NMAC would allow such processes to reach a similar end result to those obtained under affirmative defenses. Permittees would continue to be able to request relief from civil penalties for excess emissions, to be granted such relief when circumstances warranted, and to appeal EHD's assessment of penalties to the Court of Appeals.

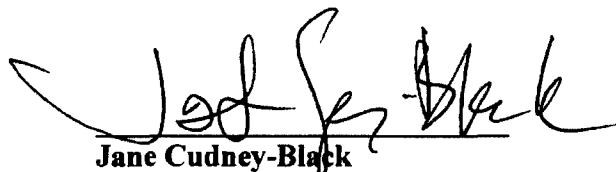
9. Unlike the actions requested in EHD's Petition, the alternative of removing 20.11.49 NMAC only from the SIP, while retaining affirmative defenses in a regulation effective only under state (and local) law, would leave 20.11.49 NMAC in violation of federal law regarding requirements at 40 CFR § 70.11(a)(3) for state and local Title V operating permit programs.

10. In light of the foregoing, this rulemaking action is within the Air Board's legal authority and addresses all appropriate facts and circumstances. NMSA 1978, § 74-2-4(E); ROA §9-5-1-4(C); and Bernalillo County Ordinances, § 30-33(C).

Order

1. It is hereby ordered that the proposed regulatory change attached to EHD's Petition filed June 27, 2016 is adopted, as modified by EHD's proposed floor amendment, with any non-substantive modifications necessary for filing with the State Records Center and Archives.
2. The amended 20.11.49 NMAC shall become effective 30 days after filing with the State Records Center and Archives. NMSA 1978 § 74-2-6(F).
3. Upon the amended 20.11.49 NMAC being filed with the State Records Center and Archives and published in the New Mexico Register as required by NMSA 1978 § 14-4-1 et seq., it is hereby ordered that EHD prepare and send a proposed SIP revision to EPA consistent with the requirements in 40 CFR Part 51, Appendix V, requesting that EPA remove 20.11.49 NMAC in its entirety from the SIP.

ISSUED this 14th day of September, 2016



Jane Cudney-Black

Chair, Albuquerque – Bernalillo County Air Quality Control Board

**STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**

**IN THE MATTER OF THE PETITION TO AMEND
20.11.49 NMAC, *EXCESS EMISSIONS***

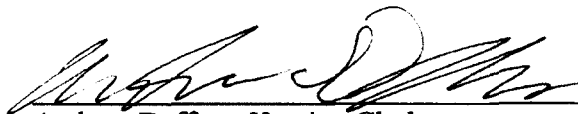
AQCB Petition No. 2016-3

**Environmental Health Department,
City of Albuquerque, Petitioner.**

NOTICE OF FILING

I, Andrew Daffern, Air Quality Control Board Hearing Clerk, certify that I have filed with the Albuquerque-Bernalillo County Air Quality Control Board the "Affidavit of Publication" for the *Notice of Hearing* that was published in the *Albuquerque Journal* on Friday, July 29, 2016. The *Albuquerque Journal's* "Affidavit of Publication" confirms publication of the *Notice of Hearing* within applicable regulatory timeframes. This document is attached to this pleading and is a supplement to the *Affidavit of Publication and Notice of Filing* that was filed on August 26, 2016.

Respectfully submitted,



Andrew Daffern, Hearing Clerk
Air Quality Program
Environmental Health Department
P.O. Box 1293
One Civic Plaza NW, Room 3023
Albuquerque, New Mexico 87102

RECEIVED
ENVIRONMENTAL HEALTH
16 OCT 17 PM 4:04

CERTIFICATE OF SERVICE

I hereby certify that I have e-mailed a true and correct copy of the foregoing NOTICE OF FILING on this 17th day of October, 2016, to the following:


E-mailed

Felicia Orth
orthf@yahoo.com
Hearing Officer

E-mailed

Carol M. Parker, Assistant City Attorney,
Air Quality Program
cparker@cabq.gov
Counsel for Petitioner

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew Daffern', is written over a horizontal line.

Andrew Daffern, AQCB Hearing Clerk

NOTICE TO PERSONS WITH DISABILITIES: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.

AFFIDAVIT OF PUBLICATION

STATE OF NEW MEXICO
County of Bernalillo

SS

Sharon Friedes, being duly sworn, declares and says that she is Advertising Director of The Albuquerque Journal, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefore has been made of assessed as court cost; that the notice, copy of which is hereto attached, was published in said paper in the regular daily edition, for 1 times on the following dates:

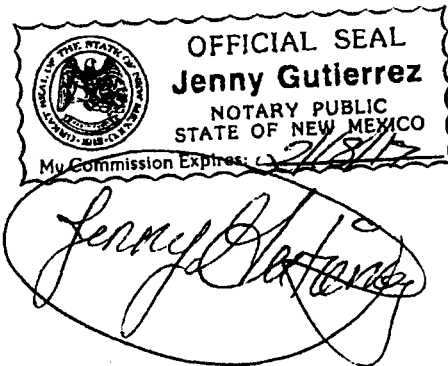
July 29, 2016

Sharon Friedes

Sworn and subscribed before me, a Notary Public, in and for the County of Bernalillo and State of New Mexico this 28 day of July of 2016.

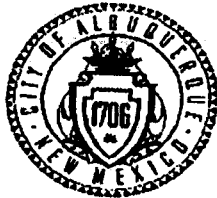
PRICE \$146.71

Statement to come at end of month.



CLA-22-A (R-1/93)

ACCOUNT NUMBER 100 75 80



ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD NOTICE OF HEARING TO CONSIDER ADOPTION OF PROPOSED AMENDMENTS TO 20.11.49 NMAC, EXCESS EMISSIONS

On Wednesday, September 14, 2016, at 5:30 PM, the Albuquerque-Bernalillo County Air Quality Control Board (Air Board) will hold a public hearing in the Vincent E. Sniego Chambers located in the assessment level of the Albuquerque-Bernalillo County Government Center, One Civic Plaza NW, Albuquerque, NM. The hearing will address a petition for regulatory change from the City of Albuquerque. Environmental Health Department (EHD), proposing to adopt amendments to 20.11.49 NMAC, excess emissions and request at the U.S. Environmental Protection Agency (EPA) withdraw regulation in its entirety from Albuquerque - Bernalillo County portion of the New Mexico State Implementation Plan (SIP) air quality.

Following the hearing, the Air Board at its regular monthly meeting the same evening is expected to consider adopting the amendments. The agenda for the regular monthly meeting will be viewable at least 72 hours in advance of the meeting at <http://www.cabq.gov/airquality/air-quality-control-board/events/september-14-2016-air-quality-control-board-meeting>.

On May 22, 2015, the EPA finalized an action requiring 36 states to remove SIP provisions on affirmative defenses for excess emissions during startup, shutdown, and malfunction of a facility. EPA has determined that such affirmative defense provisions, including those now in effect in Albuquerque and Bernalillo County, are substantially inadequate to meet the requirements of the federal Clean Air Act.

The City of Albuquerque Environmental Health Department, Air Quality Program, plans to comply with this federal requirement by proposing an amended version of 20.11.49 NMAC, Excess Emissions.

The Public Review Draft of the amended 20.11.49 NMAC may be reviewed during regular business hours at the Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, NM 87102. Copies of the Public Review Draft may be obtained by contacting Andrew Daffern, Air Quality Control Board Liaison, at (505) 768-2601 or adaffern@cabq.gov. The Public Review Draft and EHD's petition for regulatory change can also be found on the web site of EHD, Air Quality Program, at: <http://www.cabq.gov/airquality/air-quality-control-board/documents/ehds-petition-to-amend-20-11-49-nmac-excess-emissions-and-request-its-removal-from-the-state-implementation-plan.pdf>.

If the Air Board adopts the amendments, EHD asks that the Air Board authorize a request to EPA to remove the entire 20.11.49 NMAC from the SIP.

The hearing on the proposed regulatory change will be conducted in accordance with NMSA 1978 § 74-2-6; City of Albuquerque Joint Air Quality Control Board Ordinance, ROA § 9-5-1-6, Adoption of Regulations, Notice and Hearing; Bernalillo County Ordinance, Section 30-35, Adoption of Regulations, Notice and Hearings; and 20.11.82 NMAC, Rulemaking Procedures—Air Quality Control Board.

All interested persons will be given a reasonable opportunity at the hearing to submit relevant evidence, data, views and arguments, orally or in writing, to introduce exhibits, and to examine witnesses. Interested persons may present technical or non-technical testimony.

Persons wishing to present technical testimony must file with the hearing clerk a written notice of intent (NOI) to do so by 5:00 p.m. on Tuesday, August 30, 2016. The contact information for the hearing clerk is: Andrew Daffern, Air Quality Control Board Liaison, Environmental Health Department, One Civic Plaza, NW, Suite 3023, Albuquerque, New Mexico 87102.

As required by 20.11.82.20 NMAC, the NOI shall:

- (1) Identify the person for whom the witness(es) will testify;
- (2) Identify each technical witness that the person intends to present and state the qualifications of the witness, including a description of their education and work background;
- (3) Include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;
- (4) Include the text of any recommended modifications to the proposed regulatory change;
- (5) List and attach an original and 15 copies of all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and
- (6) Be served on the petitioner, if the document is an NOI filed by any person other than the petitioner.

An NOI must also follow the filing and service requirements of 20.11.82.16 NMAC.

As provided by 20.11.82.22 NMAC, any member of the general public may present non-technical testimony at the hearing. No prior notification is required to present non-technical testimony. Any member of the public may also offer exhibits in connection with non-technical testimony, as long as the exhibit is not unduly repetitious of the testimony. A member of the general public who wishes to submit a non-technical written statement for the record in lieu of oral

testimony shall file the written statement prior to the hearing, or submit it at the hearing. Written statements submitted prior to the hearing may be directed to the hearing clerk, Andrew Daffern, at the above contact information.

NOTICE FOR PERSON WITH DISABILITIES OR SPECIAL NEEDS: If you have a disability or require special assistance to participate, including translation/interpretation service, or review of any agendas, minutes, or other public meeting documents, please contact Andrew Daffern, hearing clerk, by 5:00 p.m. on Tuesday, August 30, 2016, at (505) 768-2601, or adaffern@cabq.gov. TTY users requiring special assistance may call the New Mexico Relay at 1-800-659-8331.
Journal: July 29 2016



ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD



Chair, Ms. Jane Cudney-Black, City
Jens Deichmann, PhD, County
Ms. Michelle Milano, County
Ms. Deborah L. Stover, County

Vice Chair, Kelsey Curran, CIH, CHMM, City
Mr. Ben Everson, City
VACANT, City

Non-voting members: BCPC Liaison - Lenton Malry, PhD,
COA/EPC Liaison - Mr. Jim Peck,
Secretary to the Board - Mr. Dario Rocha

Date: July 13, 2016 (Wednesday)
Time: 5:30 p.m.

General inquiries regarding this agenda may be directed to Andrew Daffern (505) 768-2601 (adaffern@cabq.gov).
For documents related to each agenda item, please go to:
<http://www.cabq.gov/airquality/air-quality-control-board/events/july-13-2016-air-quality-control-board-meeting>

Location:
Vincent E. Griego Chambers
Albuquerque-Bernalillo County
Government Center
One Civic Plaza NW
Albuquerque, NM 87102

Regular Monthly Meeting Draft Agenda

CALL TO ORDER

- Item #1** Approval of Agenda (Chair)
Item #2 Approval of June 8, 2016 Meeting Minutes (Chair)

PUBLIC COMMENT

AIR PROGRAM REPORT

Staff available for questions.

ACTION ITEMS

- Item #3** Request for a Hearing in the Matter of the Environmental Health Department's Petition to Amend 20.11.49 NMAC – *Excess Emissions* and Request its Removal from the State Implementation Plan (AQCB Petition No. 2016-3) – Carol Parker, Assistant City Attorney

REPORTS

OTHER BUSINESS

ADJOURNMENT

NEXT SCHEDULED BOARD MEETING AND HEARING: August 10, 2016

Members of the public who wish to address the Board may do so by signing up with the Board Clerk and indicating the agenda item they intend to address or their intention to make a general public comment. Sign-up must occur prior to the Board's consideration of each item. Each person will be given up to two minutes to speak.

****Notice to persons with disabilities: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.****



ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

Vincent E. Griego Chambers
Albuquerque-Bernalillo County Government Center
One Civic Plaza NW, Albuquerque, NM 87102



MINUTES – July 13, 2016 Regular Meeting

AQCB MEMBERS PRESENT

Ms. Jane Cudney-Black (CITY), Chair
Ms. Kelsey Curran, CIH, CHMM (CITY),
Vice Chair
Mr. Ben Everson (CITY)
Ms. Michelle Miano (COUNTY)
Dr. Lenton Malry, Ph.D. (BCPC LIAISON)
Mr. James Peck, (COA/EPC LIAISON)

AQCB MEMBERS ABSENT

Dr. Jens Deichmann, Ph.D. (COUNTY)
Ms. Deborah L. Stover (COUNTY)

STAFF PRESENT

Mr. Andrew Daffern, AQCB Liaison

Ms. Mary Lou Leonard, Director, EHD
Mr. Ed Merta, Air Quality Regulation
Development Coordinator
Mr. Fabian Macias, Air Quality Official
Mr. Danny Nevarez, Deputy Director, EHD
Ms. Felicia Orth, Air Board Attorney
Ms. Carol Parker, Assistant City Attorney
Mr. Damon Reyes, EH Manager
Mr. Dario Rocha, EH Manager and AQCB
Secretary
Mr. Dwayne Salisbury, EH Supervisor
Mr. Isreal Tavarez, EH Manager

VISITORS PRESENT

None

MEETING MINUTES

CALL TO ORDER

Chair Cudney-Black called the meeting to order at 5:37 p.m. on July 13, 2016.

Item #1 Approval of Agenda (Chair)

Vice Chair Curran moved to approve the agenda and Member Miano seconded.
The motion passed by a vote of 4-0.

Item #2 Approval of June 8, 2016 Meeting Minutes (Chair)

Vice Chair Curran moved to approve the June 8, 2016 meeting minutes and
Member Everson seconded. The motion passed by a vote of 4-0.

PUBLIC COMMENT

There was no public comment.

AIR PROGRAM REPORT

Mr. Danny Nevarez, Environmental Health Department Deputy Director, presented the air program staff report. Mr. Nevarez then answered questions from the Board.

ACTION ITEMS

Item #3 Request for a Hearing in the Matter of the Environmental Health Department's Petition to Amend 20.11.49 NMAC – *Excess Emissions* and Request its Removal from the State Implementation Plan (AQCB Petition No. 2016-3) – Carol Parker, Assistant City Attorney

Ms. Carol Parker, Assistant City Attorney, presented the Request for a Hearing. Ms. Parker, Mr. Nevarez, and Mr. Ed Merta, Air Quality Regulation Development Coordinator, then answered questions from the Board.

Vice Chair Curran moved to grant the hearing request and appoint Felicia Orth as Hearing Officer, and Member Miano seconded. The motion passed by a vote of 4-0.

REPORTS

OTHER BUSINESS

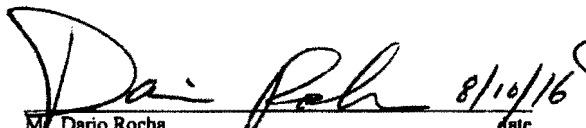
ADJOURNMENT

Chair Cudney-Black adjourned the meeting at 6:05 p.m.

NEXT SCHEDULED BOARD MEETING AND HEARING: August 10, 2016, 5:30 p.m.,
Vincent E. Griego Chambers

SUBMITTED:

READ AND APPROVED:


Mr. Dario Rocha
Board Secretary/Env. Health Manager, Control Strategies Division,
Air Quality Program, Environmental Health Department.


Ms. Jane Cudney-Black
Chair
Albuquerque – Bernalillo County Air Quality Control Board

10 Aug '16
date



**ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD**



Chair, Ms. Jane Cudney-Black, City
Jens Deichmann, PhD, County
Ms. Michelle Miano, County
Ms. Deborah L. Stover, County

Vice Chair, Kelsey Curran, CIH, CHMM, City
Mr. Ben Everson, City
VACANT, City
Non-voting members: BCPC Liaison - Lenton Malry, PhD,
COA/EPC Liaison – Mr. Jim Peck,
Secretary to the Board – Mr. Dario Rocha

Date: September 14, 2016 (Wednesday) Time: 5:30 p.m.	Location: Vincent E. Griego Chambers Albuquerque-Bernalillo County Government Center One Civic Plaza NW Albuquerque, NM 87102
<i>General inquiries regarding this agenda may be directed to Andrew Daffern (505) 768-2601 (adaffern@cabq.gov).</i> For documents related to each agenda item, please go to: http://www.cabq.gov/airquality/air-quality-control-board/events/september-14-2016-air-quality-control-board-meeting	

Regular Monthly Meeting Draft Agenda

CALL TO ORDER

- Item #1** Approval of Agenda (Chair)
- Item #2** Approval of August 10, 2016 Meeting Minutes (Chair)

PUBLIC COMMENT

AIR PROGRAM REPORT

Staff available for questions.

ACTION ITEMS

- Item #3** Discussion of Board Response to EPA Following Acceptance of Administrative Complaint for Investigation [EPA File No. 13R-14-R6]

HEARING

In the Matter of the Environmental Health Department's Petition to Amend 20.11.49 NMAC – *Excess Emissions* and Request its Removal from the State Implementation Plan (AQCB Petition No. 2016-3) – Carol Parker, Assistant City Attorney

ACTION ITEMS con't.

- Item #4** Decision on the Matter of the Environmental Health Department's Petition to Amend 20.11.49 NMAC – *Excess Emissions* and Request its Removal from the State Implementation Plan (AQCB Petition No. 2016-3) and adoption of the Statement of Reasons

REPORTS

OTHER BUSINESS

ADJOURNMENT

NEXT SCHEDULED BOARD MEETING: October 12, 2016

Members of the public who wish to address the Board may do so by signing up with the Board Clerk and indicating the agenda item they intend to address or their intention to make a general public comment. Sign-up must occur prior to the Board's consideration of each item. Each person will be given up to two minutes to speak.

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ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

Vincent E. Griego Chambers
Albuquerque-Bernalillo County Government Center
One Civic Plaza NW, Albuquerque, NM 87102



DRAFT MINUTES – September 14, 2016 Regular Meeting/Hearing

AQCB MEMBERS PRESENT

Ms. Jane Cudney-Black (CITY), Chair
Ms. Kelsey Curran, CIH, CHMM (CITY),
Vice Chair
Dr. Jens Deichmann, Ph.D. (COUNTY)
Mr. Ben Everson (CITY)
Ms. Michelle Miano (COUNTY)
Dr. Lenton Malry, Ph.D. (BCPC LIAISON)
Mr. James Peck, (COA/EPC LIAISON)
Ms. Deborah L. Stover (COUNTY)

AQCB MEMBERS ABSENT

STAFF PRESENT

Mr. Eric Ames, Contract Attorney
Mr. Andrew Daffern, AQCB Liaison
Ms. Mary Lou Leonard, Director, EHD
Mr. Fabian Macias, Air Quality Official
Mr. Ed Merta, Air Quality Regulation
Development Coordinator

Mr. Travis Miller, EH Supervisor
Mr. Danny Nevarez, Deputy Director, EHD
Ms. Felicia Orth, Air Board Attorney
Ms. Carol Parker, Assistant City Attorney
Mr. Damon Reyes, EH Manager
Mr. Dario Rocha, EH Manager and AQCB
Secretary
Mr. Dwayne Salisbury, EH Supervisor
Mr. Isreal Tavarez, EH Manager

VISITORS PRESENT

Ms. Esther Abeyta, SWOP
Mr. Steven Abeyta, SWOP
Mr. Jarrett Airhart, Trinity Consultants
Ms. Cindy Chapman, Bean & Associates,
Inc.
Mr. Eric Jantz, NMELC
Mr. Juan Reynosa, SWOP
Mr. Robert White, Western Refining

DRAFT MEETING MINUTES

CALL TO ORDER

Chair Cudney-Black called the meeting to order at 5:35 p.m. on September 14, 2016.

Item #1 Approval of Agenda (Chair)

Vice Chair Curran moved to approve the agenda and Member Everson seconded. The motion passed by a vote of 6-0.

Item #2 Approval of August 10, 2016 Meeting Minutes (Chair)

Vice Chair Curran moved to approve the August 10, 2016 meeting minutes and Member Deichmann seconded. The motion passed by a vote of 6-0.

PUBLIC COMMENT

There was no public comment.

AIR PROGRAM REPORT

Mr. Danny Nevarez, Environmental Health Department Deputy Director, presented the air program staff report.

ACTION ITEMS

Item #3 Discussion of Board Response to EPA Following Acceptance of Administrative Complaint for Investigation [EPA File No. 13R-14-R6]

Public comment was offered by Mr. Juan Reynosa, Mr. Steven Abeyta, and Ms. Esther Abeyta.

Member Deichmann moved that the Board authorize Ms. Orth to prepare a written response to the complaint to be filed by September 27, 2016, and to agree to informal resolution meetings with the Environmental Protection Agency. Member Stover seconded. The motion passed by a vote of 6-0.

HEARING

In the Matter of the Environmental Health Department's Petition to Amend 20.11.49 NMAC – *Excess Emissions* and Request its Removal from the State Implementation Plan (AQCB Petition No. 2016-3) – Carol Parker, Assistant City Attorney

Hearing Officer Orth opened the hearing record at 6:16 p.m.

Mr. Eric Ames, Contract Attorney for the Environmental Health Department, presented a legal overview of the Environmental Health Department's Petition to Amend 20.11.49 NMAC – *Excess Emissions* and Request its Removal from the State Implementation Plan (AQCB Petition No. 2016-3). Mr. Dario Rocha, Environmental Health Manager, and Mr. Damon Reyes, Environmental Health Manager, presented a summation of their direct written testimony in the Environmental Health Department's Notice of Intent to Present Technical Testimony.

There was no public comment.

Mr. Ames, Hearing Officer Orth, Mr. Reyes, Mr. Rocha, Mr. Isreal Tavarez, Environmental Health Manager, then answered questions from the Board.

Hearing Officer Orth closed the hearing record at 7:11 p.m.

ACTION ITEMS con't.

Item #4 Decision on the Matter of the Environmental Health Department's Petition to Amend 20.11.49 NMAC – *Excess Emissions* and Request its Removal from the State

Daffern, Andrew

From: DeLapp, Robin <Robin.DeLapp@pnmresources.com>
Sent: Tuesday, August 30, 2016 2:15 PM
To: Daffern, Andrew
Cc: Horn, Claudette; Hale, John Jr.
Subject: Public Hearing to Consider Adoption of Proposed Amendments to 20.11.49 NMAC, Excess Emissions

Good Afternoon,

Public Service Company of New Mexico (PNM) would like to submit the following written statement, in lieu of oral testimony, for the public hearing to consider adoption of proposed amendments to 20.11.49 NMAC, Excess Emissions scheduled for September 14, 2016.

In addressing the Environmental Protection Agency (EPA) finding that certain State Implementation Plan (SIP) provisions are inadequate to meet Clean Air Act requirements, the City of Albuquerque, Environmental Health Department, should adopt the approach as proposed by the New Mexico Environment Department (NMED). The NMED is proposing to remove certain sections of the SIP (Sections 111, 112, 113, and other sections as needed), leaving these sections as a state-only enforceable rule. The NMED is not proposing any changes to 20.2.7, Excess Emissions.

By having the NMED and Environmental Health Department (Department) approach the SIP call in a similar manner, companies which have permitted facilities both inside and outside Bernalillo County can expect predictable outcomes when reporting excess emissions. The Department's proposed amendments to 20.11.49, Excess Emissions, allows a permittee to submit a "supplemental report" instead of an "affirmative defense". The proposed change in 20.11.49.16(D), states "The Department's determination of how much weight to give information in a supplement report is based on its sole discretion...". Although the proposed changes will allow a permittee to provide the Department with additional information, this statement gives the Department enforcement discretion and could result in different outcomes depending upon the enforcement personnel reviewing the supplemental report. This does not give a permittee confidence in consistent Department responses.

The Department should adopt the NMED proposed approach and consider no change in rulemaking or regulations but instead pull the applicable sections out of the SIP.

Please let me know if you have any questions.

Robin DeLapp | Technical Project Manager | PNM Resources Environmental Services | 505.241.2016 (o) | 505.362.0730 (m) | 2401 Aztec Road, NE | Mail Stop Z100 | Albuquerque, NM 87107

PNM Resources

Be the Reason